147-308

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1407~~. 1044 ~~1075~~ 25

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFFS IN ERROR,

vs.

THE SAN PABLO AND TULARE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 21, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1467.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFFS IN ERROR,

vs.

THE SAN PABLO AND TULARE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 *Complaint.*

In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant.

Plaintiff avers that on the 15th day of August, in the year eighteen hundred and eighty-five, the State board of equalization assessed the franchise, roadway, road-bed, rails, and rolling stock of the defendant at the sum of $900,000.00; that the board apportioned the said assessment as follows: To the county of Alameda, the sum of $27,392.00; to the county of Contra Costa, the sum of $706,304.00; to the county of San Joaquin, the sum of $166,304.00.

That the defendant is indebted to plaintiff for State and county taxes for the year eighteen hundred and eighty-five in the following sums: For State taxes, in the sum of $4,896.00; for county taxes of the county of Alameda, in the sum of $248.17; for county taxes of the county of Contra Costa, in the sum of $4,633.35; for county taxes of the county of San Joaquin, in the sum of $924.65, with five per cent. added to each of said several sums for non-payment of taxes.

Plaintiff demands judgment against defendant for said several sums, with five per cent. added thereto, and costs and counsel fees, as allowed by law, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the code of civil procedure.

D. M. DELMAS,
Attorney for Plaintiff and the Controller.

(Endorsed:) Filed M'ch 10th, 1886. Jas. J. Flynn, clerk, by E. P. Casserly, deputy clerk.

2 *Summons.*

In the Superior Court in and for the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SAN PABLO & TULARE RAILROAD COMPANY, Defendant,

Action brought in the superior court, city and county of San Francisco, State of California, and the complaint filed in said city and county of San Francisco, in the office of the clerk of said superior court.

The People of the State of California send greeting to the San Pablo & Tulare Railroad Company, defendant:

You are hereby required to appear in an action brought against

you by the above-named plaintiff in the superior court, city and county of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served elsewhere within thirty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a judgment against you for delinquent taxes for the year 1885 in the following sums: For State taxes, in the sum of $4,896.00; for county taxes for the county of Alameda, in the sum of $248.17; for the county of Contra Costa, in the sum of $4,633.35; for the county of San Joaquin, in the sum of $924.65, with five per cent. added to each of said several sums for non-payment of taxes, and also for costs and counsel fees, as provided by law, all of which is more particularly set out in the complaint on file herein, to which your attention is particularly directed.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will take judgment against you for the sum of $10,702.17, with 5% added thereto, and also for costs and counsel fees, as provided by law.

3 Given under my hand — the seal of the said superior court, at the city and county of San Francisco, State of California, [SEAL.] this 10th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

JAS. J. FLYNN, *Clerk*,
By E. P. CASSERLY,
Deputy Clerk.

Affidavit of Service of Summons.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

George Lezinsky, being duly sworn, deposes and says that he is and was at and before the several times hereinafter mentioned a citizen of the United States, over the age of eighteen years, a resident of the city and county of San Francisco, and not a party to the within-entitled action and competent to be a witness on the trial thereof.

That on the 10th day of March, 1886, he served the annexed summons on the defendant, The San Pablo and Tulare Railroad Company, a corporation, by delivering personally to and leaving with W. V. Huntington, as secretary of said corporation, defendant, at the city and county of San Francisco, a copy of said summons attached to a copy of the complaint in said action.

GEO. LEZINSKY.

Subscribed and sworn to before me this 10th day of March, 1886.
[NOTARIAL SEAL.] LEE D. CRAIG,
Notary Public.

(Endorsed :) Filed March 11th, 1886. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

4 In the Superior Court in and for the City and County of San Francisco, State of California.

THE PEOPLE, Plaintiff,
vs.
SAN PABLO AND TULARE ——, Defendant.

The above-entitled cause is assigned to department No. 5.
Dated March 10th, A. D. 1886.

M. A. EDMONDS,
Presiding Judge.

(Endorsed :) Filed March 10, 1886. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

Appointment of Attorney to Commence Action.

OFFICE OF THE STATE CONTROLLER.

I do hereby authorize and appoint D. M. Delmas, Esq., as attorney to begin in the proper court an action in the name of The People of the State of California against The San Pablo and Tulare Railroad Company to collect the delinquent taxes for the year 1885 upon the property of said company assessed by the board of equalization. I also authorize the said attorney to sue out attachments and to take all other steps necessary to the collection of said taxes.

Sacramento, March 1st, 1886.

JOHN P. DUNN, *Controller.*

(Endorsed :) Filed Mar. 10, '86. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

5 *Answer.*

In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant. } No. 17240.

I.

The defendant, answering the complaint of the plaintiff in this action, alleges that before the commencement of this action the said plaintiff commenced an action in this court against this defendant upon the said identical cause of action stated in the complaint in this present suit mentioned; and this defendant further says that the parties in this and the former suit are the same and not other or

different parties, and that the said former suit so brought and prosecuted against it, the said defendant, by the said plaintiff as aforesaid is still pending and undetermined in this court.

II.

For a further, separate, and distinct answer defendant denies each and every allegation in said complaint had, made, or contained; denies that on the 15th day of August, in the year 1885, or at any other time the State or any board of equalization assessed the franchise, roadway, road-bed, rails, or rolling stock at the sum of $900,000.00 or any other sum; denies that said or any board apportioned the said pretended or any assessment in any manner whatever; denies that said or any board apportioned said pretended or any assessment to the county of Alameda the sum of $27,392.00 or to the county of Contra Costa the sum of $706,304.00 or to the county of San Joaquin the sum of $166,304.00 or to either or any of said counties the said or any sum or sums whatever.

Denies that it now is or ever has been indebted to plaintiff
6 for State or county or any taxes for the year 1885 or for any other year; denies that it now is or ever has been indebted to plaintiff for taxes for said or any year for State taxes in the sum of $4,896.00 or any other sum; for county taxes of the county of Alemada, in the sum of $248.17 or any other sum; for county taxes of the county of Contra Costa, in the sum of $4,633.35; —,in the sum of $924.65 or any other sum; denies that it is indebted *of* plaintiff for State or county taxes in said or any sums; denies that it is indebted to plaintiff in the sum of five or any per cent. added to said or any sums for non-payment of taxes or otherwise or at all.

Defendant refers to and makes part of this subdivision the matter stated in subdivisions 3 to 18 of this answer.

7 And, for further and separate answer, defendant avers as follows:

II.

Defendant a Corporation—Its Place of Business—Line of Road—Stockholders.

The defendant is and for more than five years last past has been a corporation existing under the laws of the State of California, and as such it constructed a line of railroad known as the San Pablo and Tulare railroad, extending from the intersection of the Central Pacific railroad at Tracy, San Joaquin county, running thence westerly through Bethany station to the northeasterly corner of Alameda county; thence in same course 1.40 miles through the said corner to line of Contra Costa county; thence continuing westerly and southerly through Byron, Brentwood, Bay Point, and Avon to the intersection of Northern railway at Martinez, in Contra Costa county. The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California. Some of its stockholders and members now are and ever have been citizens of the United States and residents of said State of

California, and some of its stockholders and members now are and ever have been citizens of the United States and *bona fide* residents of States other than the State of California.

III.

Length of Road in the Several Counties.

The total length of said railroad in said State of California is 46.00 miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Joaquin, 8.50 miles; in the county of Alameda, 1.40 miles, and in the county of Contra Costa, 36.10 miles.

8 IV.

Indebtedness of Defendant Secured by Mortgage.

On the 1st day of April, 1875, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad hereinbefore described. To secure the payment of such indebtedness the defendant, on the said first day of April, 1875, executed and delivered a mortgage upon its said railroad, its franchises, and all rolling stock and appurtenances. Said indebtedness exceeded and still exceeds three thousand dollars per mile of said road, and no part thereof has ever been paid except the accruing interest, and the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company, and has been and still is secured by said mortgage. Much of said indebtedness subsisted and still subsists in favor of citizens and *bona fide* residents of the State of California.

V.

Assessment by State Board of Equalization.

On the 15th day of August, 1885, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Such assessment included all property and kinds of property men-

tioned in section 3665 of the political code of California as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors.

VI.

State Board Pretended to Assess the Whole of said Property to Defendant.

The State board of equalization, in making the said pretended assessment, pretended to assess to and against defendant the full cash value of sail railroad, roadway, road-bed, rails, rolling stock, and franchises as prescribed in said section 3665 without deducting therefrom the value of the mortgage or any part thereof given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

VII.

State Board did not Treat said Mortgage as an Interest in the Property.

In making said pretended assessment the State board of equalization did not deem or treat said mortgages as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgages thereon.

VIII.

Authority Exercised by State Board Violates Provisions of Fourteenth Amendment.

Under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State; and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local boards of equalization. By the provisions of the constitution of California and the laws in pursuance thereof this right and privilege or any right or privilege to be heard in relation to assessments is denied to defendant in respect to the property in question; all of which defendant avers is contrary to the provision of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

IX.

Further Violation of the Fourteenth Amendment.

The power conferred upon the State board of equalization by section ten of article XIII of the constitution of California violates the provision of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law; for that said section, as to such power, is self-executing and com-
9 plete and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and hence, under and by said provision of the constitution of the State of California, the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice to them or an opportunity to be heard.

X.

Further Discrimination.

The provisions of section four of the constitution of the State of California providing for the assessment of the property of railroad and other quasi-public corporations is in contravention of the provisions of said fourteenth amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas under said section four of said article XIII of the constitution of the State of California, if the property of natural persons or corporations not *quasi* public has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance, whereas in the case of the property of railroad and other quasi-public corporations no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the constitution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations or by private corporations or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not *quasi* public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XI.

Further Discrimination.

Section 10 of article XIII of said constitution of California provides that all property except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township or district in which it is situated in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

The assessors of the several counties in the State of California have, as the defendant is informed and believes and so avers, in each year since the adoption of said constitution, assessed all moneys, credits, bonds and stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership, situated in their said counties, and all dues and credits held, owned, or in the possession of persons resident in said county to such persons.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant on account of the assessments made as aforesaid to the holders of such indebtedness.

XII.

Further Discrimination.

All owners of railroad property operated in more than one county by virtue of said section ten of article XIII are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prohibit its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and that at all of said times there

were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county; that by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from overvaluations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together, and there now exists in California and ever have existed corporations formed under said laws for fire, marine, mutual life, health, and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals, for the purposes of acquiring lands in large tracts and distributing them as homesteads among the corporators, for savings and loans, for mining, for the sale and distribution of water in cities and towns; for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are and for more than three years last past have been various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations, other than railroad corporations, to wit, by mining and manufacturing corporations. There now is and for more than three years last past has been a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is and ever has been operated in more than one county in this State, and is of the same gauge as the road of this defendant, and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is and for more than three years last past has been in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States and resident of the State of California.

There now is and for more than three years last past has been a railroad extending from the town of Santa Cruz, on the Pacific Ocean and in the county of Santa Cruz, eastward through said county and into

the county of Monterey to the town of Pajaro, a distance of about twenty-one miles. Said road now is and for a long time past has been owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is and for a long time past has been in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad or quasi-public corporation.

There now are and for more than five years last past have been divers other railroads owned and operated in said State by corporations other than railroad corporations and by individuals and partnerships, and that all of said corporations individuals, and
11 partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and, as said defendant, upon information and belief, avers, have been allowed such deductions.

XIII.

System Adopted by said Board Violates Rules of Equality.

The State board of equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

The value of such fences which were not the property of defendant nor the property of the owners of said roadway and the increased value affixed to the roadway by the system adopted by the board are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

Defendant, upon its information and belief, avers that the said State board of equalization adopted a system of valuation in respect to all the property mentioned and referred to in section 10 of article XIII of the Constitution which defines the power of said board, which system was by said board intended to and which did operate unequally and which was intended to and did violate the rule prescribed by said section—that all of such property should be assessed at its actual value. The system so adopted was applied by the said board in making said pretended assessment of said property and in making the assessment of all property in the State over which the pretended authority of said board extended.

Said system was to include within the value of the roadway the value of the fences owned and possessed by coterminous proprietors and to value said roadway at double its actual value, because the

right thereto was acquired by condemnation. Said system, relative to the rolling stock of railroads, was to value the same at sixty per cent. above its actual cost, when new, and to value such rolling stock at double its actual value. Said system, relative to the franchise, was to value it at $2,000 per mile, when the actual value, as the board well knew, of said franchise as an entirety did not exceed twenty-five dollars. Said system, as to the valuation of other property to be assessed by the said board, was to value it at double its actual value. Said system was by the said board adopted and was by it applied in making all assessments made by it with the intent and purpose wrongfully and unlawfully to cause the owners of property assessed by it to pay double the rate of State and county taxes paid by the owners of property assessed by local assessors; and defendant avers, upon its information and belief, that the said board applied the said system in making the pretended assessment against the property upon which the taxes mentioned in the complaint are based; and defendant, upon its information and belief, avers that the said State board of equalization in making said pretended assessment did not value any of said property at its actual value, but did intentionally and for the purpose of making defendant pay an unequal proportion of State and county taxes assess the said property at double its actual value; and defendant avers that the general rule in this State has been to assess property at not over two-thirds its cash or actual value, and that this rule was adopted and acted upon by all local assessors in the State and by the said State board, except in the exercise of the power conferred by section 10, art. XIII, of the State constitution, for said fiscal year, and that all property, save that assessed by the said State board under said section, has been valued and assessed at one-third less than its actual value, and that the taxes have been collected on valuations so made.

XIV.

Valuation Excessive.

Neither the franchise, roadway, road-bed, rails, or rolling stock were assessed by the State board of equalization in said pretended assessment at their actual value or in proportion to their value, but were willfully and intentionally assessed greatly in excess and out of proportion to such value and greatly in excess of and out of proportion to the rate at which all other property in said State is valued for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

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XV.

Sole Authority upon which Tax is Based.

Said pretended assessment is the only assessment of said property, and the pretended tax for non-payment of which this action is brought is founded upon said pretended assessment and upon no other assessment.

XVI.

Plaintiff's Causes of Action Based upon Assessment by State Board of Equalization.

On the 15th day of August, 1885, the State board of equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of the railroad hereinbefore described against this defendant; that said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

XVII.

Tender.

On the tenth day of December, 1885, the defendant, while then and now denying all liability upon said pretended assessment, and claiming that all of the proceedings had in relation thereto were in violation of law and the rights of this defendant, tendered and offered the said plaintiff the sum of $6,421.30 in United States gold coin in part payment of the tax claimed, with an agreement that the receipt of said sum should not prejudice the plaintiff in any legal rights; and the defendant now brings said sum into court and offers the same to plaintiff, and, if refused by plaintiff, subjects the said sum to such orders or judgments as the court may make in the premises; and defendant avers that of the sum so tendered it tendered specifically for the benefit of the State and on the amount claimed by the State the sum of $2,937.60, and on account of the various county taxes claimed it tendered sums as follows, to wit:

For the county of Alameda the sum of	$148 90
For the county of Contra Costa the sum of	2,780 01
For the county of San Joaquin the sum of	554 79

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XVIII.

No Rules or Regulations.

Said State board of equalization has never at any time made or adopted any rule or regulation relative to the assessment or valuation of railway property of any kind, nor has it ever made or

adopted any rule to govern or regulate its proceedings in the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

Wherefore defendant prays it be hence dismissed with costs.

H. S. BROWN,
Attorney for Defendant.

S. W. SANDERSON AND
CREED HAYMOND,
Of Counsel.

Verification.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

W. V. Huntington, being first duly sworn, on oath says that he is an officer—to wit, the secretary—of the corporation, defendant herein; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

W. V. HUNTINGTON.

Subscribed and sworn to before me this 18th day of March, A. D. 1886.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Due service of the within answer admitted this 19th day of March, 1886. D. M. Delmas, attorney for plaintiff and controller. Filed March 19th, 1886. Jas. J. Flynn, clerk, by L. J. Welch, deputy clerk.

14 *Petition for Removal of Case to U. S. Circuit Court.*

In the Superior Court, City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant. } No. 17240.

To the honorable the superior court in and for the city and county of San Francisco, State of California:

Your petitioner, The San Pablo and Tulare Railroad Company, respectfully shows—

That your petitioner is the sole defendant in the above-entitled action, now pending in this honorable court.

That said action was bought on the 10th day of March, 1886, the complaint therein having been duly filed on said date.

That the defendant has on this day and before the filing of this petition appeared in said action and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action, and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

The said action is a suit of a civil nature at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

15 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and payable, is an assessment which the State board of equalization of the State of California pretended to make under and by virtue of the authority conferred upon the board by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California and the authority thereby conferred upon said State board of equalization violate the provisions of the fourteenth amendment to the Constitution of the United States, in this, that its effect is to deprive the defendant of its property without due process of law, and that under it the defendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value;

Second. Require such proportions to be ascertained by a general law;

Third. Require, before the liability is fixed, that the right to be heard must be given;

Fourth. Which give an appeal from the assessor to another tribunal;

Fifth. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property;

Sixth. Prescribe the mode and manner of the assessment; and,

Seventh. Which allow deductions from indebtedness secured by mortgage;

Eighth. Which require property to be assessed at its actual value.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, and others of them then and now citizens and *bona fide* residents of other States of the Union, in large sums for moneys ad-

vanced to construct and equip its railroad described in the answer herein; that to secure the payment of such indebtedness the defendant, long prior to the said day, executed and delivered a mortgage upon its railroad and all rolling stock and appurtenances; that said indebtedness exceeded and still exceeds three thousand dollars per mile of said road; that no part thereof has ever been paid except the accruing interest, and that the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company, defendant, and has been and still is secured by said mortgage.

That the said pretended assessment made as aforesaid by said State board of equalization included the whole value of said property without any deduction therefrom; that under the constitution of the State of California, when property other than property such as is described in the complaint is assessed and valued for the purposes of taxation, it is the duty of the assessor making such valuation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property; that the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the fourteenth amendment of the Constitution
16 of the United States; that defendant and others similiarly situated are not entitled to the reduction hereinbefore referred to; that said decision of the supreme court of the State of California is in full force and is binding upon the inferior courts of the State, and especially upon this court; that the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition; that the plaintiff in said action will rely upon the decision of the supreme court of the State of California, and that the construction of the fourteenth amendment to the Constitution of the United States is in this action disputed and must necessarily be adjudged and determined herein, and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California such adjudication and determination will be conclusive in favor of defendant upon the merits of this action; that this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the States and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done upon removal of a suit

in a circuit court of the United States from a State court; and your petitioner is ready and willing to give such other and further bonds and to do all such other acts as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond and proceed no further in said suit, and that said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

H. S. BROWN,
Attorney for Petitioner.

S. W. SANDERSON AND
CREED HAYMOND,
Of Counsel.

Endorsed: Filed March 19th, 1886. Jas. J. Flynn, clerk, by L. J. Welch, deputy.

17 *Bond on Removal to U. S. Circuit Court.*

In the Superior Court, City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
SAN PABLO AND TULARE RAILROAD COMPANY, Defendant. } No. 17240.

Know all men by these presents that we, The San Pablo and Tulare Railroad Company, as principal, and E. H. Miller, Jr., and S. T. Gage, as sureties, are held and firmly bound unto The People of the State of California, plaintiff, in the sum of five thousand dollars, to be paid to the said plaintiff; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of March, 1886.

Whereas the above-entitled action was brought, on or about the 10th day of March, 1886, in the superior court in the city and county of San Francisco, State of California, and the same is now pending in said superior court, by said The People of the State of California against said San Pablo and Tulare Railroad Company, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;"

And whereas said The San Pablo and Tulare Railroad Company has made and is about to file herewith its petition in said suit in said superior court in and for the city and county of San Francisco,

State of California, for the removal of said suit into said circuit court of the United States to be held in the said district of California, in the ninth circuit:

Now, the condition of this obligation is such that if said The San Pablo and Tulare Railroad Company shall enter in such circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; otherwise to remain in full force and virtue.

18

SAN PABLO AND TULARE RAILROAD COMPANY,
[SEAL.] By W. V. HUNTINGTON, *Secretary.*
S. T. GAGE. [SEAL.]
E. H. MILLER, JR. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

E. H. Miller, Jr., and S. T. Gage, the sureties in the foregoing obligation, being each sworn, each for himself says that he is a resident of the State of California and a freeholder therein and is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

E. H. MILLER, JR.
S. T. GAGE.

Subscribed and sworn to before me this twelfth (12th) day of March, 1886.

[NOTARIAL SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

I hereby approve of the above sureties and accept and approve the foregoing bond.
Dated March 19, 1886.

JOHN HUNT,
Judge Superior Court, City and County of San Francisco.

Endorsed: Filed March 19th, 1886. Jas. J. Flynn, clerk, by L. J. Welch, deputy.

19 *Certificate of County Clerk to Record on Tran-fer to U. S. Cir. Court.*

I, Jas. J. Flynn, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court of said city and county, do hereby certify the foregoing to be a full, true, and correct copy of the whole of the record in the within action of The People of the State of Cal. *vs.* The San Pablo and Tulare R. R. Co., now on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the said superior court this 25th day of March, 1886.

[SEAL.] JAS. J. FLYNN,
County Clerk and ex Officio Clerk of the Superior Court,
By D. J. GORDON,
Deputy Clerk.

(Endorsed:) U. S. circuit court in and for the district of California. Copy of record. Filed March 29, 1886. L. S. B. Sawyer, clerk.

20 *Stipulation Waiving Jury and Submitting Cause.*

In the Circuit — of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY. } No. 4016.

And three other cases.

It is hereby stipulated that jury trials in the above-entitled actions are hereby waived, and that said causes may be submitted to the court upon the testimony referred to in the stipulation this day made and filed in the case of The People of the State of California *vs.* The Central Pacific Railroad Company, subject to the same terms and conditions. It is hereby further stipulated that special findings of facts in all of the above-entitled actions are waived. It is hereby further stipulated and agreed that the said case of The People of the State of California *vs.* The Central Pacific Railroad Company shall by the losing party be taken to the Supreme Court of the United States, and that the decision of said court in said case shall be applicable to and be treated by each party as the decision of said court in the above-entitled actions, it being the intention and desire of the parties hereto to save the expense of separate writs of error, and that all the above-entitled actions shall abide the final decision of said Supreme Court of the United States in the said case of The People of the State of California *vs.* The Central Pacific Railroad Company, provided the said decision shall be made upon points in value therein, and if not so made, then the judgments

in any of the above cases in which the point is not involved shall be set aside and finding of fact therein shall be made.

San Francisco, California, July 14, 1886.

CREED HAYMOND,
Attorney for Def'ts.
E. C. MARSHALL,
Att'y Gen'l and Att'y for Pl'ffs.

(Endorsed:) Filed July 15, 1886. L. S. B. Sawyer, clerk, by F. D Monckton, deputy clerk.

21 *Finding.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY. } No. 4016.

The parties to the above-entitled action having in writing waived trial by jury, and having by stipulation in writing waived special findings of fact, the cause having been submitted to the court for decision, the court now finds upon the issues of fact in favor of the defendant, and orders judgment accordingly.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed July 15, 1886. L. S. B. Sawyer, clerk.

22 *Judgment.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY. } No. 4016.

This cause having been tried by the court, a jury trial having been waived by written stipulation of the parties, and the court having made and filed its findings of fact in favor of the defendant, it is hereby considered and adjudged that the plaintiff take nothing and that defendant have and recover its costs, &c., taxed at $——.

Judgment entered this 15 day of July, 1886.

L. S. B. SAWYER, *Clerk.*

A true copy.
Attest, &c.:
[SEAL.]

L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed July 15, 1886. L. S. B. Sawyer, clerk.

23 *Clerk's Certificate to Judgment-Roll.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
SAN PABLO & TULARE R. R. Co. } No. 4016.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 15 day of July, A. D. 1886.

L. S. B. SAWYER, *Clerk*,
[SEAL.] By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Judgment-roll. Filed July 15, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

24 *Order Vacating Judgment.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO & TULARE R. R. Co. } No. 4016.

In pursuance of the stipulation of the parties hereto, dated March 6th, 1889, & now on file herein, it is ordered that the judgment heretofore entered in this cause be vacated and set aside.

September 30th, 1889.

SABIN, *Judge.*

(Endorsed:) Filed Sept. 30, 1889. L. S. B. Sawyer, clerk.

25 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant. } No. 4016.

The judgment heretofore rendered in the above-entitled cause having been, upon and in pursuance of the written stipulation of counsel

for the respective parties, vacated and set aside, and said cause being this day brought on to a hearing before the court without a jury, the said parties by stipulation in writing filed herein having waived a jury, and the evidence introduced by the respective parties by written stipulation filed herein having been fully considered, the court finds the following facts and conclusions of law in said action :

Findings.

I.

The cause of action mentioned in paragraphs one (1) and two (2) of the answer herein was brought without authority of law and was not and is not a bar to this action, and such action has been, prior to the trial of this cause, dismissed.

II.

Defendant is and ever since the first day of April, 1875, has been a corporation existing under the laws of the State of California, and as such it constructed a line of railroad known as the San Pablo and Tulare railroad, extending from the intersection of the Central Pacific railroad at Tracy, in San Joaquin county, through Bethany station to the northeasterly corner of Alameda county, and thence in the same course one and $\frac{40}{100}$ (1.40) miles through the same corner of Alameda county to the line of Contra Costa county; thence
26 continuing westerly and southerly through Byron, Brentwood, Bay Point, and Avon to the intersection of the Northern railway at Martinez, in Contra Costa County; that the defendant was, on the said first day of April, 1875, and ever since has been, the owner of and engaged in operating the said railroad in said counties.

That the principal place of business of said defendant now is and for many years last past has been in the city and county of San Francisco, in said State; that some of its stockholders and members are now and ever have been citizens of the United States and residents of the State of California; that some of its stockholders and members now are and ever have been citizens of the United States and *bona fide* residents of States other than the State of California; that the total length of said railroad in said State of California is forty-six (46) miles, and the length thereof in the respective counties through which it passes is as follows, to wit: In the county of San Joaquin, eight and $\frac{50}{100}$ (8.50) miles; in the county of Alameda, one and $\frac{40}{100}$ (1.40) miles, and in the county of Contra Costa, thirty-six and $\frac{10}{100}$ (36.10) miles.

III.

On the 15th day of August, 1885, the State board of equalization of the State of California, acting under and by virtue of the powers conferred upon it by the constitution of the State of California, assessed the franchise, roadway, road-bed, rails, and rolling stock of

defendant at the sum of nine hundred thousand dollars and apportioned the said assessment as follows, to wit: To the county of Alameda, the sum of twenty-seven thousand three hundred and ninety-two dollars; to the county of Contra Costa, the sum of seven hundred and six thousand three hundred and four dollars, and to the county of San Joaquin, the sum of one hundred and sixty-six thousand three hundred and four dollars.

That taxes were levied upon the said assessment in the manner provided by law for the levy of taxes on railroad companies owning railroads operated in more than one county against the defendant for the fiscal year 1885–1886 in the following sums: For State taxes, the sum of $4,896, and for county taxes for the county of Alameda, the sum of $248.17; for county taxes for the county of
27 Contra Costa, in the sum of $4,633.35, and for county taxes for the county of San Joaquin, in the sum of $924.65.

That after the making of said assessment the State board of equalization did and performed all the acts, duties, and things by law required to be done concerning the said assessment, and all the acts, duties, and things required by the constitution of the State of California and the laws passed in conformity therewith concerning the levy and collection of said taxes alleged to be due to the plaintiff from the defendant were done and performed prior to the commencement of this action.

IV.

That on the 2nd day of September, 1878, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad of the defendant; that to secure the payment of said indebtedness the defendant on said day executed and delivered a mortgage on its said railroad, its franchises, and all rolling stock and appurtenances; that said indebtedness did then and still does exceed three thousand dollars per mile on said road, and no part thereof except the accrued interest has ever been paid, and the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company and has been and still is secured by said mortgage.

V.

The said assessment was made for the purpose of taxation for the fiscal year of said State beginning on the first day of July, 1885, and ending on the 30th day of June, 1886, upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against said defendant. The said assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board; that said assessment is the assessment upon which the several taxes mentioned in the complaint herein are

based; that no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year; that
28 in said assessment there was not included any other property or kinds of property belonging to said defendant corporation except that of the said franchise, roadway, road-bed, rails, and rolling stock, and said assessment did not include any other of the property or the kinds of property mentioned in section 3665 of the political code of the State of California as amended March 9th, 1883, except said franchise, roadway, road-bed, rails, and rolling stock.

VI.

That the State board of equalization in making the said assessment assessed to and against said defendant the full cash value of said railroad, road-bed, rails, rolling stock, and franchise without deducting therefrom the value of the mortgage or any part thereof given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of said mortgage.

VII.

That in making said assessment the State board of equalization, acting under and by virtue of the power conferred upon it by the constitution of the State of California, did not deem or treat such mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

VIII.

That by the provisions of the constitution of the State of California and the laws made in pursuance thereof the right and privilege to be heard in relation to assessments is granted to defendant in respect to the property in question; that before and at the time of the making of the said assessment said defendant had full, due, and legal notice thereof, and appeared before said board of equilization and had a full and legal hearing on the matter of the making of the said assessment.

IX.

That all railroads owned and operated in more than one county in said State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of said defendant.

29 X.

That from the year 1883 to the year 1886, and during all the times herein mentioned, there was a railroad in use and operation, extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance

of twenty-seven miles, which said road was operated in more than one county in this State, and was of the same gauge as the road of defendant, and has ever been operated for like purposes; that said road, with all its equipments, for the period aforesaid was in the ownership and under the operation and control of N. D. Rideout, a citizen of the United States and a resident of the State of California; that there was for the same period a railroad extending from the town of Santa Cruz, on the Pacific Ocean, and into the county of Monterey, towards the town of Pajaro, a distance of about twenty-one miles; that said road was during the period aforesaid owned, operated, and used for like purposes for which the defendant's road was owned, operated, and used, and that the same was during said period in the ownership of and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad corporation; that there was at said period and there now are divers other railroads owned and operated in said State of California by corporations other than railroad corporations and by individuals and partnerships.

XI.

That the State board of equalization in making said assessment did not include in the valuation of the roadway or at all in said assessment the value of fences erected upon the land of coterminous proprietors, or include in the said assessment the value of any fences whatever, and did not value the said roadway at a greater value than the value of other property similarly situated, or greater than its actual value.

XII.

That the said board of equalization in making said assessment did not assess the said franchise, roadway, road-bed, rails, or rolling stock of said defendant or any part thereof for more than their actual value or more than their actual cash value, and did not in making up the values of any part of said property so assessed include the value of any other property of any kind or nature whatever, and did make the said assessment upon the same basis for valuation as all other property in said State is valued for the purpose of taxation.

XIII.

That no part of the taxes alleged to have beeen imposed upon the property of the defendant as aforesaid has ever been paid.

Conclusions of Law.

From the foregoing facts the court finds, as a conclusion of law, that the defendant is entitled to judgment of dismissal of this action with costs, and judgment is hereby ordered to be entered for the defendant with costs.

SABIN, *Judge.*

Sept. 30th, 1889.

Endorsed: Filed Sept. 30, 1889. L. S. B. Sawyer, clerk.

31 *Judgment on Findings and Conclusions of Law.*

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY. } No. 4016.

In this cause the counsel for the respective parties hereto—G. A. Johnson, Esq., attorney general of the State of California, for plaintiff, and Creed Haymond, Esq., for defendant—having by written stipulation, filed herein on the 23rd day of April, 1889, agreed that the judgment heretofore entered herein on the 15th day of July, 1886, be set aside, and that the cause be submitted to the court for consideration and decision upon the agreed statement of facts filed herein on the 23rd day of April, 1889, and the cause having been so submitted, and the court after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith, and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the court that the plaintiff take nothing by this action, that the defendant go hereof without day, and that defendant recover from plaintiff its costs in this behalf expended, taxed at $—.

Judgment entered September 30, 1889.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 30th day of September, A. D. 1889.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed September 30, 1889. L. S. B. Sawyer, clerk.

32 *Clerk's Certificate to Judgment-Roll.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY. } No. 4016.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 30th day of September, 1889.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Judgment-roll. Filed September 30th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

33 *Stip. Setting Aside Judg't & Agreed Statement of Facts.*

In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant. } No. 4016.

It is hereby stipulated and agreed that the judgment heretofore made and entered in the above-entitled action be vacated and set aside and the cause be submitted to the court upon the following agreed statement of facts, on which findings shall be made and conclusions of law drawn by the court:

I.

The cause of action mentioned in paragraphs 1 and 2 of the answer herein was brought without authority of law, and was and is not a bar to this action, and such cause of action has been prior to the trial of this action dismissed.

II.

The defendant is and ever since the 1st day of April, 1875, has been a corporation existing under the laws of the State of California, and as such it constructed a line of railroad known as the San Pablo and Tulare railroad, extending from the intersection of the Central Pacific Railroad at Tracy, in San Joaquin county, through Bethany Station, to the northeasterly corner of Alameda county; thence in same course 1.40 miles through the same corner to line of Contra Costa county; thence continuing westerly and southerly through Byron, Brentwood, Bay Point, and Avon to the intersection of Northern railway at Martinez, in Contra Costa county.

That the defendant was on the said 1st day of April and ever since has been the owner of and engaged in operating the said railroad in the said counties above mentioned.

The principal place of business of defendant now is and for many years last past has been in the city of San Francisco, State of California.

34 Some of its stockholders and members now are and ever have been citizens of the United States and residents of said

State of California, and some of its stockholders and members now are and ever have been citizens of the United States and *bona fide* residents of States other than the State of California.

The total length of said railroad in said State of California is forty-six miles, and the length thereof in the respective counties through which it passes is as follows: In the county of San Joaquin, 8.50 miles; in the county of Alameda, 1.40 miles, and in the county of Contra Costa, 36.10 miles.

III.

On the 15th day of August, 1885, the State board of equalization of the State of California, acting under and by virtue of the powers conferred upon it by the constitution of the State of California, assessed the franchise, roadway, road-bed, rails, and rolling stock of defendant at the sum of $900,000.00. Said board apportioned the said assessment as follows:

To the county of Alameda, the sum of $27,392; to the county of Contra Costa, the sum of $706,304; to the county of San Joaquin, the sum of $166,304. Upon the said assessment taxes were, in the manner provided by law for the levy of taxes on railroad companies owning railroads operated in more than one county, levied against the defendant for the fiscal year 1885–1886 in the following sums:

For State taxes, the sum of $4,896, and for county taxes for the county of Alameda, in the sum of $248.17; for county taxes for the county of Contra Costa, in the sum of $4,633.35; for county taxes for the county of San Joaquin, in the sum of $924.65.

After the making of the said assessment the State board of equalization did and performed all the acts, duties, and things by law required of them to be done concerning the said assessment. All the acts, duties, and things required by the constitution of the State of California and the laws passed in conformity therewith concerning the levy and collection of said taxes alleged to be due to the plaintiff from the defendant were done and performed prior to the commencement of this action.

35 IV.

On the 2nd day of Sept., 1878, the defendant was indebted to divers persons, citizens of the United States and many of them then and now citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad of the defendant. To secure the payment of such indebtedness the defendant on said day executed and delivered a mortgage on its said railroad, its franchises, and all rolling stock and appurtenances, a copy of which mortgage is hereto annexed and made part hereof. Said indebtedness exceeded and still exceeds $3,000.00 per mile of said road, and no part thereof has ever been paid except the accruing interest, and the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company, and has been and still is secured by said mortgage.

V.

Said assessment was made for the purposes of taxation for the fiscal year of said State, beginning on the 1st day of July, 1885, and ending on the 30th day of June, 1886, upon the franchises, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said assessment was not made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, but all of said properties were blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. In said assessment there was not included any other property or kinds of property belonging to said defendant corporation except that of the said franchises, roadway, road-bed, rails, and rolling stock. Said assessment did not include any other of the property or kinds of property mentioned in section 3665 of the political code of California as amended March 9th, 1883, except said franchise, roadway, road-bed, rails, and rolling stock.

VI.

The State board of equalization in making the said assess-
36 ment assessed to and against defendant the full cash value of said railroad, roadway, road-bed, rails, rolling stock, and franchise without deducting therefrom the value of the mortgage or any part thereof given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of such mortgage.

VII.

In making said assessment said State board of equalization, acting under and by virtue of the power conferred upon it by the constitution of the State of California, did not deem or treat said mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

VIII.

By the provisions of the constitution of the State of California and the laws in pursuance thereof the right and privilege to be heard in relation to assessments is granted to defendant in respect to the property in question, and before and at the time of the making of said assessment said defendant had full, due, and legal notice thereof, and appeared before the said board of equalization and had a full and legal hearing on the matter of the making of said assessment.

IX.

All railroads owned and operated in more than one county in the

State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of the defendant.

X.

That from the year 1883 to the year 1886 and during all the times herein mentioned there was a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in the State of California, a distance of twenty-seven miles, which said road was operated in more than one county in this State and was of the same gauge as the road of defendant and has ever been operated for like purposes; that said road, with all its equipments, for the period aforesaid was in the ownership and under the operation and control of one
37 N. D. Rideout, a citizen of the United States and a resident of the State of California; that there was for the same period a railroad extending from the town of Santa Cruz, on the Pacific Ocean, and into the county of Monterey, towards the town of Pajaro, a distance of about twenty-one miles; that said road was during the period aforesaid owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same was during said period in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not and never has been a railroad corporation; that there was at said period and there now are divers other railroads owned and operated in said State of California by corporations other than railroad corporations and by individuals and partnerships.

XI.

For the purpose of this case only, and not because the defendant admits it as a fact, but denies it, the defendant admits that the State board of equalization in making said assessment did not include in the valuation of said roadway or at all in the said assessment the value of fences erected upon the land of coterminous proprietors or include in the said assessment the value of any fences whatever, and did not value the said roadway at a greater value than the value of other property similarly situated or greater than its actual value.

XII.

For the purpose of this case only, and not because defendant admits it as a fact, but denies it, the defendant admits that the said board of equalization in making said assessment did not assess the said franchise, roadway, road-bed, rails, or rolling stock of said defendant or any part thereof for more than their actual value or more than their actual cash value, and did not, in making up the values of any part of said property so assessed, include the value of any other property of any kind or nature whatsoever, and did make the said assessment upon the same basis for valuation as all other property in said State is valued for the purposes of taxation.

38 XIII.

No part of the taxes alleged to have been imposed upon the property of the defendant as aforesaid has ever been paid. To take effect when app. & signed by the attorney general.

March 6th, 1889.

CREED HAYMOND,
Gen. Solicitor & Att'y for Def't.
G. A. JOHNSON,
Attorney General of California.

(Endorsed:) Filed April 23rd, 1889. L. S. B. Sawyer, clerk.

39 *Bond on Appeal.*

In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant in Error.

Know all men by these presents that we, William H. Friend and Arthur G. Towne, both residents of the northern district of California, are held and firmly bound unto the San Pablo and Tulare Railroad Company, a corporation organized under the laws of the State of California, in the sum of five hundred dollars, to be paid the said San Pablo and Tulare Railroad Company or its successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators and successors firmly by these presents.

Sealed with our seals and dated this 7th day of October, A. D. 1889.

Whereas the above-named The People of the State of California have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States in and for the northern district of California, in the ninth circuit:

Now, therefore, the condition of this obligation is such that if the above-named The People of the State of California shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

WM. H. FRIEND.
ARTHUR G. TOWNE.

Signed, sealed, and delivered in the presence of—
F. D. MONCKTON.

40 UNITED STATES OF AMERICA,
Northern District of California, } *ss:*

William H. Friend and Arthur G. Towne, being duly sworn, each for himself deposes and says that he is a householder in said dis-

trict and is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

WM. H. FRIEND.
ARTHUR G. TOWNE.

Subscribed and sworn to before me this 7th day of October, A. D. 1889.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

The foregoing bond is hereby approved and accepted, Oct. 7th, 1889.

GEO. M. SABIN, *Judge.*

Endorsed: Filed October 7th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

41 In the Circuit Court of the United States for the Ninth Judicial Circuit in and for the Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs and Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant and Defendant in Error.
} No. 4016.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing forty written and printed pages, numbered from 1 to 40, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above and therein entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this tenth day of October, A. D. 1889.

L. S. B. SAWYER, *Clerk.*

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, northern district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The People of the State of California, plaintiffs and plaintiffs in error, and The San Pablo and Tulare Railroad Company, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs and plaintiffs in

error, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the twenty-eighth day of October, 1889, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. Cal.

The above writ of error is hereby allowed.

GEO. M. SABIN, *Judge.*

43 [Endorsed:] 4016. United States Supreme Court. The People of the State of California, pl'ffs in error, *vs.* San Pablo and Tulare Railroad Co., def't in error. Writ of error. Service admitted Oct. 7, '89. Filed October 7th, 1889. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

The answer of the judges of the circuit court of the United States for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

44 UNITED STATES OF AMERICA, *ss:*

To the San Pablo and Tulare Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 28th day of October, A.

D. 1889, pursuant to a writ of error issued by the clerk of the circuit court of the United States for the northern district of California and duly allowed by the judge of said circuit court, wherein The People of the State of California are plaintiffs and plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Sabin, judge of the district court of the United States for the district of Nevada, acting as U. S. circuit judge, 9th circuit, this 7th day of October, A. D. 1889, and of the Independence of the United States the one hundred and fourteenth.

GEO. M. SABIN, *Judge.*

45 [Endorsed:] 4016. In the Supreme Court of the United States. The People of the State of California, pl'ffs and pl'ffs in error, *vs.* San Pablo and Tulare Railroad Co., def't and def't in error. Citation. Service of within citation by copy admitted this seventh day of October, 1889. Creed Haymond, att'y for def't. Filed October 7th, 1889. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

46 In the Circuit Court of the United States, Ninth Circuit Northern District of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in Error,
vs.
THE SAN PABLO & TULARE RAILROAD COMPANY, Defendant in Error.

Assignment of Errors.

Come now the said People of the State of California, the plaintiffs in error herein, and say that in the said record and proceedings there is manifest error in this, to wit:

That by the record aforesaid it appears that said judgment was given for said defendant and against said plaintiff, whereas by the law of the land it ought to have been given for said plaintiffs and against said defendant.

That the said circuit court erred in ordering judgment to be entered for said defendant upon the findings of facts made and filed by said court in said cause.

That said circuit court erred in not ordering judgment to be entered upon said findings of facts for said plaintiffs and against said defendant for the recovery of the amount of the taxes sued for in said cause.

That said circuit court erred in deciding that in and by the assessment of the property of said defendant for the purposes
47 of taxation the said defendant was denied the equal protection of the laws.

And said plaintiffs pray that the judgment aforesaid may be reversed and annulled.

G. A. JOHNSON,
Attorney General, &
A. L. RHODES,
Attorneys for the Plaintiffs in Error.

Endorsed on cover: No. 1467. N. California C. C. U. S. The People of the State of California, plaintiffs in error, *vs.* The San Pablo & Tulare Railroad Company. Filed October 21, 1889.

144-302

FILED.
MAR 8 1890
JAMES. H. McKENNEY,
CLERK.

WITHDRAWN

Supreme Court of the United States.

OCTOBER TERM 1889.

No. ~~1407.~~ 257

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs in Error,

vs.

THE SAN PABLO & TULARE RAILROAD COMPANY,

Defendants in Error.

Error to the Circuit Court of the United States, Northern District of California.

Brief Submitted by Mr. Edmunds, of Counsel for the Defendants in Error.

THOMAS McGILL & Co., Printers.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 1467.

CALIFORNIA

vs.

SAN PABLO & TULARE RAILROAD COMPANY.

Brief of Mr. Edmunds for Defendants in Error.

The statement of the case is condensed in the complaint (Record, p. 1), and the answer (Record, pp. 3–12 inclusive), and for all substantial purposes is in the findings of the Court (Record, pp. 21–24 inclusive).

I.

The case coming here from the Circuit Court to which it had been properly removed from a State Court, all questions arising on the record are open.

II.

These questions arise under two general and entirely distinct heads.

The *first* is whether the statute law of California relating to the taxes in question is valid under the State Constitution.

This question is so exhaustively treated in the brief of Messrs. Brown and Haymond, presented to the Supreme Court of California in a recent case between these same parties (and herewith submitted) that any further observations seem unnecessary.

The second question arises under the fourteenth amendment of the National Constitution; and to this question what follows applies.

The California constitution of 1879 provides, in the first section of the 13th article, as follows:

"SECTION 1. All property in the State not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public

schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits or debts due to *bona fide* residents of this State."

And in the second:

"SECTION 2. Land, and the improvements thereon, shall be separately assessed," etc.

And in the fourth:

"SECTION 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby, is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; provided that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

The defendant is a State corporation having a railroad in two or more counties.

Before and at the time of the assessment of the tax in question, it owed a debt, secured by a mortgage, on its road and all its property to the amount of more than $3,000 a mile, and due to resident citizens of California, as well as others. [Findings 4, p. 22.]

The State Board of Equalization valued and assessed the franchises, roadway, road-bed, rails and rolling-stock of the defendant in one undivided and inseparable mass at its full value, without taking into account the said mortgage or mortgage debt, knowing the fact of the mortgage, etc. [Findings 3, 4, 5 and 6, Record, pp. 21, 22, 23.]

And the tax for which this suit was brought was made up and demanded accordingly.

During all this time there were "divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships." [Finding 10, Record, p. 24.]

And there were also railroads in more than one county owned and operated by individual citizens not corporations. [Finding 10, Record, p. 24.]

The question I present is not that the State has wrongfully provided a *mode* of assessment of railroads in more than one county differing from that applied to other property, however unequally this may operate in imposing local taxes in the particular county in which the

railroad is worth nothing locally (which the apportionment in this case fully illustrates), but it is that the State has undertaken—

1st. To tax individual citizens having the same kind of property and doing the same kind of business by the same means in more than one county, only upon the value of their *real* interest in their real estate, the railroad, while it has undertaken to tax railroad corporations on precisely the same sort of property, used in the same way, for more than the value of their *real* interest in their real property, the railroad, by requiring the mortgage interest in the first case to be taken out of the taxation (as morally it ought to be) upon the owner of it; and in the second case (ours), forbidding it to be taken out.

Under the constitution of California no corporation can have any right, privilege, or franchise that any individual may not have freely and as of right without any action of the legislature (Bill of Rights, sec. 21). Article 4 of the California constitution forbids the legislature to pass any law "granting to any corporation, association, or individual, any special or exclusive right, privilege, or immunity."

Consequently the right of citizens, whether acting separately or as associates, are in these and all other respects made precisely the same. One single citizen may and does [Record, p. 23; finding 10] exercise every power that the defendant in this case does, and under precisely the same circumstances in every respect, and yet is taxed only on what he really has of value in his property; while two citizens associated as of common right, under the name of railroad corporation, to hold the same sort of property and for the same purpose, are taxed on a different and injurious principle.

The so-called "classification" is a classification of *persons as persons*, and not as it respects the nature of property, of calling, of occupation, or of franchise.

I do not question the right of the classification of *things* or *occupations*, or *franchises* for taxation. My point is, that the classification of *persons*, whether single or associated, and declaring that one kind or description of *person* is to be definitely and injuriously discriminated against in respect of precisely the same sort of property, occupation, and right, that all other persons are favored in, comes within the very letter as well as the spirit of the denunciation of the Fourteenth Amendment.

The description in the California constitution is a description of persons, and not of occupation, calling, franchise, or property. It is a particular sort of person that is put out of the category of just taxation, and expressly denied the justice of a *real* valuation of its property that is secured to all others. A railroad company in California has no right or franchise that a single citizen may not, and (as it appears in this very case) does not, have and enjoy.

Suppose the State constitution had said that mortgages on the property of blacksmiths should be taken out of the valuation of their property, and mortgages on the property of farmers should not? The blacksmith and farmer are equally free to pursue their callings. Could

this be called a classification of property or calling for taxation, or a tax on a franchise? But in California, I repeat, there can be no franchise or privilege that includes or favors one person, or an association of persons, and excludes another.

If the State constitution had said that all persons *operating* railroads, blacksmith shops, or farms should be taxed on the full value (or double it) of their property, it would present a totally different question from that in hand, however difficult it might be to maintain such a rule.

But here the discrimination is made, not because either of the nature of the property, or the nature of the occupation, but solely because of the particular social characteristic of the citizen.

The same kind of property of other citizens, used in the same way, both in more than one county and in single counties, is required to be valued on one principle (and a just one), while the same kind belonging to another citizen and used in the same way, is required to be and has been valued on a harder and unjust principle, so that this defendant has been required to pay on the same kind of property under the same situation, and employed in the same occupation and under the same circumstances, except its personal name, a tax on the valuation of $3,000 a mile of its property, which the other citizen with the same kind of property and occupation has not been required to pay.

The wicked test is made not either on the nature, or property, or privilege, but between *persons* holding the same property operated in the same way and for the same purpose.

No case in this Court has yet been decided supporting any such or any similar proposition. It is far beyond the boundary line fixed to State power by the Fourteenth Amendment. Indeed the Supreme Court of California, itself, in Central Pacific Company *vs.* State Board of Equalization, 60 Cal., p. 35, clearly conceded that if a corporation was a person entitled to the equal protection of the laws, this discrimination could not be maintained, but it held that a corporation was *not* a person and proceeded to consider and dispose of the case upon grounds not affected by the Fourteenth Amendment. It is now settled that a corporation *is* a person entitled to the equal protection of the laws in the State in which it exists.

It is also now settled that the Fourteenth Amendment is not confined to the protection of colored persons against the aggressions of the whites (although that was doubtless the leading motive that impelled its adoption), but that it covers—as it was intended and as its language was carefully framed to effect—the security of all rights of equality which may exist between the dwellers in a republic.

I beg leave to suggest, in respect of those of the cases cited by the learned attorney-general of California, in his

brief, which appear to come nearest to the case in hand, the following observations:

The slaughter-house cases were those of purely police regulation, and the State legislation made no discrimination between citizens or persons as such. It only undertook to regulate occupations affecting health. We affirm, as the Court did in those cases, that "equality of rights of citizens is a principle of republicanism." We affirm that it is the duty of the States to protect and defend that equality, and we affirm that the "obligation resting upon the United States is to see that the States do not deny the right." Whatever may have been the *impulse* of Congress in passing the Fourteenth Amendment, its language was, and was intended to be, broad enough to cover every race and every right of persons of one race or another in respect of the republican equality essential to the very idea of republican government.

The Missouri Railway Company *v.* Mackey, 127 U. S., 205.

This was on the law of Kansas, making railway companies liable for damages to their employees in consequence of any negligence of their service. It was held that such legislation did not infringe the Fourteenth Amendment. The Court put the case upon grounds that we affirm as sound as applied to this case. Those grounds were that all persons brought under the influence of the law are treated alike under the same conditions—not conditions of the personality, but conditions of operation and event. It was stated by the Court that the test of equality was in respect of "the privileges conferred and the liabilities imposed," and the classification and dis-

crimination were of operations and events, and not of persons.

Hayes *v.* Missouri, 120 U. S., 71.

This was a case of difference in State law between the right of challenge to jurors in counties of differing numbers of inhabitants. This again was an illustration of the principle we affirm—that the State may have the power to discriminate between circumstances, operations and things, while it has *not* the right to discriminate between persons. It is stated by the Court that the Fourteenth Amendment "merely requires that all *persons* subjected to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed."

This is the very essence of what we contend, in the very language of this Court in Barbier *v.* Connelly, 113 U. S., 27, that "class legislation, discriminating against some and favoring others, is prohibited;" but "legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike *all persons similarly situated*, is not within the amendment." Here the very case in hand shows the very discrimination denounced by this Court, for, as the findings expressly show, other persons than railroad corporations, with precisely the same kind of property, operated under precisely the same conditions, both in one county and in many counties, are taxed upon an entirely different and more favorable principle than railroad corporations.

Pembina Mining Company *v.* Pennsylvania, 125 U. S., 181.

This was the case of a license fee imposed by the State on foreign corporations doing business in that State; a

case certainly easy of solution. This Court said that the prohibition of the Fourteenth Amendment "was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation." "Under the designation of person, there is no doubt that a private corporation is included." The equal protection of the laws which these bodies may claim, is only such as is accorded to similar associations within the jurisdiction of the State. In California every other similar association, whether corporate (which there means nothing), or partnership or individual, has a benefit and immunity in respect of taxation which is denied to this defendant.

Kentucky Tax Case, 115 U. S., 336.

This was a case of the classification of property and not a discrimination of persons, and different means were provided for ascertaining its value from those applied to farms and property used in other ways. The rule of final equality when values were once ascertained was preserved. It was a variation of methods to reach the same result of equality of burden, which is precisely the opposite of what exists here.

All the other cases cited by the learned Attorney-General are so obviously remote from the question here that comment upon them is deemed unnecessary.

GEO. F. EDMUNDS,
Of Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

October Term, 1889.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY.

No. 1467.

In Error to the Circuit Court of the United States for the Northern District of California.

BRIEF FOR PLAINTIFFS IN ERROR.

By GEO. A. JOHNSON,
Attorney General of the State of California.

SACRAMENTO:
STATE OFFICE, : : : J. D. YOUNG, SUPT. STATE PRINTING.
1890.

IN THE

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY,
Defendant in Error.

No. 1467.

In Error to the Circuit Court of the United States for the Northern District of California.

Statement of Case.

The plaintiffs in error sued the defendant in error in the Superior Court of the City and County of San Francisco, California, to recover certain sums assessed as taxes for State and county purposes for the year 1885, by the State Board of Equalization, on defendant's franchises, roadway, roadbed, rails, and rolling stock in the Counties of Alameda, Contra Costa, and San Joaquin, through which defendant's road passes, specifying in the complaint the amount claimed as State taxes, and the amount claimed for said counties, respectively, for county purposes. (Record, p. 1.)

The defendant answered (Record, p. 3–13), and on its motion the case was transferred to the Circuit Court of the United States for the District of California, a jury was waived, and the case submitted upon testimony taken and filed in the case of *The People* vs. *The Central Pacific Railroad Company*, with a stipulation that an appeal should be taken in that case to this Court, and the decision in said last named case should be decisive of this, if upon the points involved in this case, and if not upon such points, then any judgment rendered by the Court below in this case was to be set aside, and special finding of facts had. (Record, p. 18.)

The judgment went for the defendant in error. The People appealed the case of *People* vs. *The Central Pacific Railroad Company*, and the case was advanced on their motion at the October term, 1887, of this Court.

The points involved in the decision by this Court of the case of *The People* vs. *The Central Pacific Railroad Company*, not being applicable to the case at bar, the former case, involving a Federal franchise, which the latter case did not involve, the judgment rendered in the case at bar was set aside pursuant to the stipulation, and the respective counsel, having agreed on the facts, special findings were had and filed, based on the agreed statement of facts, but the conclusion of law was the same-- that the defendant in error was entitled to judgment, and such judgment was accordingly entered. It is from this judgment that this writ of error is sued out. For agreed statement of facts see Record, pp. 26–30.

All local or State questions are eliminated from the findings, and simply a Federal question presented, whether or not Section 4 and Section 10, Article XIII, of the State Constitution, and the laws of the State of California passed in pursuance thereof, are violative of the fourteenth article of amendment to the Constitution of the United States.

Section 4, referred to, reads as follows:

"A mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other quasi public corporations, in cases of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on that security it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

Right here we beg to say that this section has been construed by the Supreme Court of California. In the case of *Central Pacific Railroad* vs. *State Board* (60 Cal., p. 59) that Court says:

"Reading the whole section, it seems very plain that as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and other quasi public corporations, they should not be deemed and treated as an interest in the property affected by them, 'for the purpose of taxation.'"

It is distinctly found by the Court that the assessment in this case did not include any property except the franchise, roadway, roadbed, rails, and rolling stock, thus eliminating all local questions as to fences, steamers, etc., and that the State Board of Equalization assessed the property at the

full cash value without deducting therefrom the value of a mortgage on the road or any part thereof, which was given to secure the indebtedness of the railroad company to the holders of its bonds, though the State Board had full knowledge of such mortgage, but that they assessed the whole value of said property to defendant in the same manner as they would have done had there been no mortgage thereon, and upon the same basis for valuation as all other property in said State.

The Court further found that defendant in error had legal notice of said assessment, appeared before the State Board of Equalization, and had a full and legal hearing on the matter of said assessment, and also that all railroads operated in more than one county in said State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of defendant.

The Court further found that no part of the said taxes had been paid by the defendant. (Findings, Record, pp. 21–24.)

Assignment of Errors.

Come now the said People of the State of California, the plaintiffs in error herein, and say that in the said record and proceedings there is manifest error in this, to wit:

That by the record aforesaid it appears that said judgment was given for said defendant, and against said plaintiff, whereas, by the law of the land, it ought to have been given for said plaintiff, and against said defendant.

That the said Circuit Court erred in ordering judgment to be entered for said defendant, upon the finding of facts made and filed by said Court in said cause.

That said Circuit Court erred in not ordering judgment to be entered upon said finding of facts for said plaintiff, and against said defendant, for the recovery of the amount of the taxes sued for in said cause.

That said Circuit Court erred in deciding that in and by the assessment of the property of said defendant, for the purposes of taxation, the said defendant was denied the equal protection of the laws.

Brief.

Section 1, Article XIV, of the amendments to the Constitution of the United States, will be conspicuously brought to the forefront by our learned friends on the opposite side, in their brief, and it will be claimed that the section of the Constitution of California above set forth antagonizes this amendment.

The amendment says, Article XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"

This Court has been very chary, heretofore, in defining what is meant by the phrase "the equal protection of the laws." At the time of the adoption of the fourteenth amendment (as we have previously said in our brief and oral argument in the California Tax Cases, Nos. 660, 661, 662, 663, 664, and 1157, at the October term, 1887, of this Court, to which we respectfully refer, as the whole subject of taxation was therein discussed, and from which we shall quote liberally in this brief) there was no complaint in respect to the subject of taxation, nor that the States were imposing any onerous burden of this kind on any person or persons.

The genesis of the amendment was the condition of the negro race; the claim that this race was deprived of certain civil rights; that after their enfranchisement something

more was necessary for their protection, and something more was necessary to be formulated into constitutional law. It was manifestly with this view that this amendment was proposed by Congress and ratified by the States. In *Strauder* vs. *West Virginia*, 100 U. S., p. 306, Mr. Justice Strong, delivering the opinion of the Court, says, as follows:

"This is one (referring to the fourteenth amendment) of a series of constitutional provisions having a common purpose, namely, securing to a race, recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as was said in the *Slaughter-house Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, *it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise Government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations that the fourteenth amendment was framed and adopted.*

"It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, *but it denied to any State the power to withhold from them the equal protection of the laws*, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-house Cases:* 'No

one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' So again: 'The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied, and by it (the fourteenth amendment) such laws were forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation.' And it was added: '*We doubt very much whether any action of a State, not directly by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision.*'

"If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity or right most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

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Under these circumstances the fourteenth amendment was adopted, and it should be interpreted in the light of those past transactions. Having incorporated into this amendment the provision that no State shall deprive any person of life, liberty, or property without due process of law, and that provision being in nearly all of the State Constitutions at the time of the adoption of the amendment, the construction given by the States to those words "due process of law" became part and parcel of the fourteenth amendment. The succeeding clause in the fourteenth article, that no State shall "deny to any person within its jurisdiction the equal protection of the laws," contains new matter.

This equality clause must, however, be also construed in the light of the surroundings to which we have already adverted—in the light that the whole scheme of taxation was and ever has been *sui generis;* and being *sui generis*, it could not have been the intention to engraft upon it the strict rules which obtain in ordinary legislation. To attempt to do so would be a vain endeavor.

Taxation being at the time so unequal in the States, or, at least, so diverse, the classification being measured only by the will of the sovereign power which adopted it; the exemptions being based upon no permeating idea, and embracing things in their nature entirely dissimilar—from a railroad to a minister of the gospel—it certainly could not have been the intention to subject all this kind of legislation to the scrutiny and control of the equality clause.

Again, the States could not have so understood it in ratifying this amendment. This subject of taxation has always been associated with the idea of power. It is the imperial emblem. It constitutes the majesty of States. They had always been accustomed to it without stint or diminution from the foundation of the Government. That a State should voluntarily abnegate this power, except where taxa-

tion impaired the efficiency, as recognized, of the Federal Constitution or statutes, and subject its laws to the surveillance and control of a few over-mastering words, is scarcely within the range of ordinary construction.

These six words, "the equal protection of the laws," have never received a definition. The argument from inconvenience is worth something in doubtful cases, as showing or tending to show that a certain construction should not be given and could not have been intended from the disastrous consequences which would flow from it. In the event of a certain construction, the revenue systems of all the States would have to be overhauled, their autonomy trampled upon; State questions heretofore would become Federal questions, and the Federal Courts would become as beehives of litigious industry.

Laws limiting corporations in holding only a certain amount of real estate, as in California and other States, would have to succumb to a superior power.

Without seeking further to define it, we argue, therefore, that the fourteenth amendment does not apply to the subject of taxation. Its language is peculiar. It does not say that the laws shall be equal; which was the most facile and natural language that could have been used if such was the intention. It simply says that the equal protection of the laws shall not be denied. It seems to contemplate laws as existing, and to furnish a safeguard against their denial to any one. It would seem more properly to refer to the executive and judicial departments of Government; but however this may be, it may be safely assumed that it was never intended by this amendment to apply the square and line to so complex a system as taxation, with its infinite ramifications and divergences, and with its summary procedure; to make that normal which in its very nature and essence is in so many respects abnormal.

In some of the States where there is a provision that taxa-

tion shall be equal and uniform, it is held that the States may classify property for the purposes of taxation. If the words "the equal protection of the laws" include taxation, the words are tantamount to saying, as far as taxation is concerned, that taxation shall be equal and uniform, and nothing more; and as these words had received a settled construction in the States at the time of the adoption of the amendment, that settled construction must prevail as in the case of the words "due process of law."

We assume, therefore, that the law in respect to taxation is the same since the amendment that it was before; that the States are unshorn of their sovereignty in this respect as much so as in the matter of eminent domain; that the inseparable incident of taxation, that of classification, still belongs to the States; that the State laws and Constitutions in this regard can still stand, and this amendment stand; that no procrustean rule has been established in a matter of so much gravity, involving the discharge of the various duties appertaining to State Governments, the keeping open of the Courts, the education of the people, the protection of all, and the revolving in its orbit of the State itself without impinging upon, and without being impinged upon, by the larger orbit of the United States.

After having said in our previous brief, already referred to, "that the law in respect to taxation is the same since the amendment that it was before," we find Mr. Cooley says the same thing, which had escaped our attention previously; and we now quote his well considered expression of opinion:

"It was not within the power of the States before the adoption of the fourteenth amendment to deprive *citizens* of the equal protection of the laws; but there were *servile classes not thus shielded*, and when they were made freemen there were some who disputed their claims to citizenship, and some State laws were in force which established discriminations against them. *To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and*

the same securities which one citizen may demand, all others are now entitled to."

Cooley on Constitutional Limitations, p. 492, 5th ed.

This reasoning of Judge Cooley's is unanswerable. The fourteenth amendment has really no application to this case as far as granting any new right is concerned, *but the power of the National Government is limited to the enforcement of its guaranty.*

United States vs. *Cruikshank et al.*, 92 U. S., p. 542.

Says Mr. Chief Justice Waite, delivering the opinion of the Court:

"The fourth and twelfth counts (of the indictment) charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in 'the free exercise and enjoyment of their several rights and privileges, to the free and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time, enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens.' *There is no allegation that this was done because of the race or color of the persons conspired against.*"

So in the case at bar, these findings do not show any unlawful discrimination against the plaintiffs in error, and the State constitutional provision cited *supra* is as applicable to domestic as foreign corporations. All corporations of a certain character are treated alike, and it is a State privilege to treat all of a class similarly.

As the *Slaughter-house Cases* were the first where the fourteenth amendment was judicially considered and passed upon, we shall quote somewhat liberally from the majority opinion. It says:

"Was it the purpose of the fourteenth amendment, by the simple declaration that no State shall make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned from the States to the National Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiff in error be sound. For not only are these rights subject to the control of Congress whenever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, *limiting and restricting the exercise of legislative power by the States in their most ordinary and useful functions*, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, *would constitute this Court a perpetual censor upon all legislation of the States*, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.

"*The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal Governments to each other, and of both of these Governments to the people, the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the Legislatures of the States which ratified them.*"

Says the Court further:

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection

of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has, under the Constitution, against another. *The equality of the rights of citizens is a principle of republicanism. Every republican Government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.*"

Alluding to that part of the amendment which says, "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws," the Court says:

"*In the light of the history of these amendments and the prevading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the end to be remedied by this clause, and by it such laws are forbidden.*

"If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. *We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, on account of their race, will ever be held to come within the province of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave the matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its Courts, shall have claimed a decision at our hands.*"

Hare, in his American Constitutional Law, vol. 1, p. 517, says, in effect, the same thing:

"The main object of this amendment (the fourteenth amendment) is clear. It was to render all persons, born or naturalized in the United States, and especially the recently emancipated negroes, citizens of the United States

and of the State wherein they reside, endowed with the rights incident to that two-fold relation, including those conferred by the second section of the fourth article, *and also to afford the possessors of such citizenship an effectual guaranty against arbitrary or unequal legislation on the part of the several States.*"

In *Missouri Railway Co.* vs. *Mackey*, 127 U. S. 208, the Court says:

"*It cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters.*"

The Court says further:

"The objection that the law of 1874 (a statute of Kansas) deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. *The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application.* Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws, because it is special in its character. If in conflict at all with that clause it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, *if all persons brought under its influence are treated alike under the same conditions.*"

All railroad and other quasi public corporations are treated alike under Section 4, Article XIII, of the Constitution of California, cited *supra*, and the findings in this

case do not find, as a matter of fact, that there is any unlawful discrimination in that State, in the assessment of these bodies for the purposes of taxation without deduction of these mortgages, but the conclusion of law is simply that the defendant below is entitled to judgment of dismissal of the action. In *Hayes* vs. *Missouri*, 120 U. S. 71, the Court says:

"The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. *It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.* As we said in *Barbier* vs. *Connolly*, speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32."

In *Pembina Mining Company* vs. *Pennsylvania*, 125 U. S., p. 189, the Court, through Mr. Justice Field, says:

"As said by Chief Justice Marshall, 'the great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' (*Providence Bank* vs. *Billings*, 4 Pet. 514, 562.) *The equal protection of the laws which these bodies may claim is only such as is acceded to similar associations within the jurisdiction of the State.*"

All railroad corporations are treated alike by the Constitution of California, in denying them the deduction of their mortgages; and, therefore, the Constitution of that State furnishes them the equal protection of the laws, and comes within the very language of the Court in *Pembina Mining Co.* vs. *Pennsylvania*, that "the equal protection of the laws which these bodies may claim is only such as is acceded to similar associations within the jurisdiction of the State."

If it shall be held, however, that the words, "the equal protection of the laws," include the whole subject of taxation, which we have endeavored to show is *sui generis*, then the question suggests itself, what is the equal protection of the laws in regard to this subject, or which is the same thing differently expressed, as already shown by us, what is the equal taxation that the United States Courts can enforce? Here I shall quote from our brief in a former case referred to *supra*, with the authorities therein cited.

Mr. Desty, in his valuable work on Taxation, vol. 1, p. 91, says:

"The Legislature, apart from constitutional restrictions, may levy taxes and devise ways of apportionment in such manner and to any extent it may deem advisable, and in the exercise of its sovereign power it may adopt any and all means for the purpose of providing revenue, and its decisions as to what is proper, just, and politic, both in respect to the subject of taxation and the kind and amount of taxes, must be final and conclusive. Its powers are to be exercised in its discretion, and the interest, wisdom, and justice of the representative body and its relations with its constituents furnish the only security against the abuse of that discretion."

In the same volume, pages 93 and 94, he says:

"*The power to tax and the power of apportionment and classification are identical and inseparable, and the legislative determination as to the just proportion to be borne by the public and the classification of subjects to be taxed is conclusive, subject only to the constitutional principle that all of the same class shall bear equal burdens, and that the principle of uniformity be preserved.*"

In Durant's Appeal, 62 Penn. 494, it is said:

"*If the taxation is upon all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality, or are scattered all over the State.* If, for example, a general tax were imposed upon all distilleries, or owners of distilleries, it would not affect the constitutionality of the tax if the distilleries all carried on their business in a particular section of the country, or were few in numbers."

In the case of *Railroad Company* vs. *Penniston*, 18 Wall., p. 30, Mr. Justice Strong, in delivering the opinion of the Court, says, in respect to State taxation:

"The extent to which it shall be exercised, the subject upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people, expressed in the State Constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power within the limits of the Constitution is complete in Congress."

In the *Kentucky Tax Cases*, 115 U. S., p. 336, the Supreme Court says:

"The discrimination against railroad companies and their property, which is the subject of complaint, as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. These latter report to the Auditor the total cash value of their property, and pay into the treasury as a tax, upon each $100 of its value, a sum equal to the tax collected upon the same value of real estate, and these reports and valuations are treated as complete and perfect assessments, not subject to revision by any Board or Court, and conclusive upon the taxing officers. But there is nothing in the Constitution of Kentucky which requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power; and there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods. *The rule of equality in*

respect to the subject only requires the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination, as made between railroad companies and other corporations, in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the Legislature has seen fit to impose."

In the foregoing opinion the Court refers to the fact that there is nothing in the Constitution of Kentucky which requires taxation to be equal and uniform. In some of the States there is such a constitutional provision, and yet the Courts have upheld the classification of property for the purpose of taxation.

State vs. *Ogden*, 10 La. An. 402.
New Orleans vs. *Kauffman*, 29 La. An. 283.

Even when the word "equal" occurs in such a connection, it means approximative, not mathematical or precise equality, which is impossible. In the first Constitution of California these words did occur: "Taxation shall be equal and uniform throughout the State." But these words do not occur in the present Constitution. The only words in respect to uniformity in the present Constitution are these: "All laws of a general nature shall have a uniform operation" (Sec. 11, Art. I); and another provision prohibiting the Legislature from passing any local or special law in certain enumerated cases.

And right here I desire to quote from a distinguished jurist of California, who never touched upon any subject which he did not irradiate with his great learning and sound judgment when on the Supreme bench of California. After he retired from the bench, he was the salaried attorney of many of the railroads in California, and represented them as their counsel in much of their litigation before this Court. I quote from *Ex Parte Smith and Keating* (38 Cal. 710):

Justice Sanderson on Classification.

"The best commentary upon the construction and meaning of the eleventh section of the first article of the Constitution of this State, which declares that 'every law of a general nature shall have a uniform operation,' with which I have ever met, is found in the context of the instrument from which it was borrowed, namely, the sixth section of the first article of the Constitution of Iowa, which reads as follows: 'All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' Here the precise language of our Constitution is used, but it is accompanied by other language, as part of the same sentence and expressive of the same idea, which serves to disperse the cloud which, by reason of the 'glittering generality' of the language employed, hangs about the meaning of our Constitution.

"The meaning of the Constitution of Iowa, and, therefore, the meaning of ours, is obvious from the latter clause of the former Constitution. Its meaning, as has been repeatedly declared by the highest judicial tribunal in the State, is not that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly, or in the same manner, upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits. (*Smith* vs. *Judge Twelfth Judicial District*, 17 Cal. 554; *French* vs. *Teschenacher*, 24 id. 554; *Bourland* vs. *Hildreth*, 26 id. 256; *Brooks* vs. *Hyde*, 37 Cal. 366.) It was not intended by this provision to prevent legislation which is local in its operation or special in its effect. It was not intended to overturn the laws of nature, or disturb the relations of cause and effect, or obliterate distinctions, where, from the very nature and necessity of things, distinctions must exist. It was not intended that all differences, founded upon class or sex, should be ignored. This must be so from the very nature of things, and from the universal custom and practice of lawmakers. A few references to existing laws, whose constitutionality has never been questioned, and without which society would be, in many respects, subject to the mercy of evildoers, is deemed sufficient to illustrate the fallacy, not to say the absurdity, of the construction for which counsel argue.

"The common law and the laws of this State in relation to the competency of witnesses have always, and still do, distinguish between persons, by providing that some shall be allowed to testify and others not. Under the common law and the laws of this State, some persons are allowed to make contracts, while the capacity to do so is denied to others—and the same person is allowed to make certain contracts, and denied the capacity to make certain other contracts; and, especially, from the commencement of English jurisprudence down to the present time, have greater disabilities in respect to the acquisition and enjoyment of property, and the power to make contracts and transact business, been imposed upon females than upon males. And so, on the other hand, have greater burdens always been cast upon males than upon females, as, for example, military and jury duties. If we enter the field of criminal law, the distinction is still maintained. Certain persons are declared to be incapable of crime, while the contrary is true of the great majority. Criminal laws, and they have always existed, which act upon males and not upon females, and others upon females and not males, as laws against rape, the crime against nature, and laws against prostitution and abortion. *To give to this provision of one State Constitution, or to the fourteenth amendment of the Federal Constitution, in view of such legislation, the construction for which counsel contend, would be to erase three fourths of the statutes of this State, to overturn the foundations of the common law itself, and to discard as useless the main pillars of the social compact*," etc.

He says, further, that in these views, Chief Justice Sawyer and Justice Sprague concurred.

In the *Delaware Railroad Tax Cases*, 18 Wall. 231, Mr. Justice Field, speaking for the Court, says,

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

Here the laws of Delaware provided that every company of the class designated should, in addition to other taxes, also pay to the Treasurer of the State, on the first day of

July of each year, a tax of one fourth of one per cent upon the actual cash value of every share of its capital stock. This was held to be not a tax on the corporate property, but simply a tax on the corporation. The opinion says further:

"The exercise of the authority, which every State possesses, to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports, or tonnage or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

There is the greatest possible divergence in the revenue systems of the different States—one imposing a tax of one per cent on the value of railroad property, another fixing by direct legislative Act a certain valuation per mile, another imposing by statute a special tax of so much on each $100 of value of railroad property, another exempting for a number of years certain railroads from taxation, another holding that the land of railroad companies is personal property, another requiring the rolling machinery to be assessed as real estate, another making the railroad track, rolling stock, and all property used in operating the road assessable as a unit by the Boards of Assessors of the several counties through which the road runs, and still others requiring such property to be assessed by a State Board.

The classification is as variant as to railroads as it is in respect to the statute of limitations, the statute of descents, or in respect to issuing writs of attachment. This difference shows clearly how deep-seated in the body politic of the different States is the idea of State sovereignty in such matters.

In *Chicago, Burlington, and Quincy Railroad Company* vs. *Iowa* (94 U. S., p. 163), Mr. Chief Justice Waite, in delivering the opinion of the Court, said:

"The statutes divide the railroads of the State into classes, according to business, and establish a maximum of rates for each of the classes. *It operates uniformly on each class, and this is all the Constitution requires.*"

On this subject of classification I cite the following authorities, also:

Kitty Roup's Case, 81 Penn. St. 216.

Wisconsin Central Railroad vs. *Taylor*, 52 Wis. 37.

The discussion of the subject in the Wisconsin case is very thorough.

Youngblood vs. *Sexton*, 32 Mich. 414-415.

In this last case I quote the following from the opinion of the Court, delivered by Judge Cooley:

"It is said the tax is invalid because it is not levied on any principle of equality or uniformity, and consequently lacks one of the essential elements of lawful taxation. If the precise point here is that the tax is unequal because it is not levied in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the Legislature, and not us. *Courts cannot annul tax laws because of their operating unequally. If they could they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings.*"

Again, he says:

"*The question whether a tax is just and equal or not is not a question of law. And this will meet any objection to the law based upon the fact that other kinds of business are not similarly taxed. Apportionment of taxation is purely a legislative function.*"

We cite also:

Milwaukee and M. R. R. Co. vs. *Waukesha*, 9 Wis. 428.

Johnson vs. *Roberts*, 102 Ill. 655.

People vs. *Mayor of Brooklyn*, 4 Comst. 419.

State vs. *Ogden*, 10 La. An. 402.
New Orleans vs. *Kauffman*, 29 La. An. 283.
State vs. *Lathrop*, 10 La. An. 402.
M. R. Ft. S. and G. R. R. Co. vs. *Morris*, 7 Kan. 210.
Kittaning Coal Co. vs. *Commonwealth*, 79 Penn. St. 104–105.
Vasser vs. *George*, 47 Miss. 713.
Woodbridge vs. *Detroit*, 8 Mich. 274.
Waring vs. *Savannah*, 60 Ga. 97.
Mayor of Athens vs. *Long*, 54 Ga. 330.
Gatlin vs. *Town of Tarbora*, 78 N. C. 119.

In *Head Money Cases* (112 U. S. 594) the Court says:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

"Is the tax on tobacco void because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void because a few States pay three fourths of the revenue arising from it?"

It must be borne in mind also that the San Pablo and Tulare Railroad Company is a California corporation, and is subject to the reserved power in regard to corporations embodied in the Constitution of the State.

The reasoning of the defendant in error will probably go to the extent that all corporations should be classified together, and, if not, that it works an inequality; or, rather, that all corporations should be assessed just as natural persons are. If the much vaunted sovereign power of taxation, which a State is supposed to possess, "has this extent, no more;" if the State has no more control over the creatures of its own creation than over natural persons; if it can impose no terms, make no reservations, and demand no compensation when it clothes these railroad entities with the power of eminent domain, itself a sovereign power, as agents of the State, a power not possessed by any but such persons as are in the exercise of a public use, it would

seem that we are using a misnomer, and the State's limited, instead of sovereign, power of taxation would be a more felicitous designation. This reserved power in dealing with its own creatures is expressed in strong and emphatic language in both of her Constitutions—that of 1849 and that of 1879.

Under the first was this provision:

"Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes. All general laws and special Acts passed pursuant to this section may be altered from time to time, or repealed."

Under the latter this reserved power is expressed thus:

"Corporations may be formed under general laws, but shall not be created by special Act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed."

After the decision in the *Dartmouth College Case* it was natural that the States should insert some provision in their organic law to modify the contractual relations which would otherwise subsist between them and the corporation. Henceforth the corporation took its right *cum onere*. The assumption of the corporate relation being purely voluntary, there was no hardship to complain of. If these corporations did not have all the rights of natural persons they became possessed of some which natural persons did not have, such as the condemnation of property for a public use and the subjection of their members to only a limited responsibility. Nor are railroad corporations the only ones under the Constitution of California which are subject to restrictions. Section 9, Article XII, of the Constitution says:

"No corporation shall engage in any business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized;

nor shall it hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business."

Corporations are not to discuss with the State, which claims its reserved power, questions of public policy while they hold on to their certificate of incorporation. The State, in its wisdom, has deemed proper that this differentiation should exist in respect to landed assessments between them and natural persons; and in matters of local concern, involving the running of the State Government, and the mode and classification of taxation for revenue purposes, the State is paramount, and cannot be called to account by the creatures of its own making. It is sufficient to know that all of a certain class are included in the taxation programme, and that the law operates uniformly.

Judge Cooley, in his work on taxation, p. 378, says:

"But it is common to classify them (corporations) separately for taxation, and corporations of different kinds, as railroad, insurance, banking, and manufacturing corporations, are, also, thus classified in the discretion of the Legislature. The method of taxing these artificial bodies, when not fixed by the Constitution or by charter, is left to the legislative judgment, and the diversity actually met with under tax laws is very great."

The decisions as to the reserved power in State Constitutions to alter and repeal the charters of corporations are mostly one way.

In *Iron City Bank* vs. *The City of Pittsburg*, 37 Pa. St. 340, Woodward, Judge, delivering the opinion of the Court, it was held that where a bank obtained its charter under a law providing "that the capital stock of such bank shall not be subject to taxation for any other than State purposes," the Legislature may, notwithstanding, authorize the imposition of taxes for other than State purposes by virtue of the Constitution of Pennsylvania, as amended, which provides that "every such (bank) charter shall con-

tain a clause reserving to the Legislature the power to alter, revoke, or annul the same, whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators."

In *Union Improvement Company* vs. *The Commonwealth*, 69 Pa. St. 140, it was held that where by a supplemental Act in 1862 it was provided that the "capital stock and dividends" of an improvement company should not be taxable, but by the Act of May 1, 1868, "the capital stock of all companies, whether incorporated under any law of this commonwealth, etc., except banks, etc., shall be subject to pay a tax annually at the rate," etc., that the said Act of 1862 was repealed by the Act of 1868, and the corporation was liable to taxation under the Act of 1868. In the original Act of incorporation the Legislature reserved the right to alter, etc., the charter at any time thereafter, and this reservation conferred the power to impose the tax.

In the case of *Hewett* vs. *The New York and Oswego Midland Railway Company*, 12 Blatchford's C. C. Rep., p. 453, where the Legislature of New York provided by an Act in 1866 that the property of the defendant should be exempt from taxation until a certain event should happen, but for a term not exceeding ten years, and in 1874, and as was alleged before such event had happened, the Legislature passed an Act subjecting the property of the corporation to taxation for the future, it was held, Mr. Justice Blatchford delivering the opinion, that by reservations in the Constitution and statutes of the State, the Legislature had the right to amend the charter of the corporation by repealing such exemption from taxation; that the reserved power constituted a condition, and that immunity from taxation was subject to be revoked by the State at any time in the discretion of the Legislature. This decision was rendered in 1875.

In the *Sinking Fund Cases*, 99 U. S., p. 700, the decision was put upon the ground that the right of amendment had been reserved by Congress.

In the case of *Appeal Tax Court of Baltimore City* vs. *Baltimore Academy of Visitation*, 50 Md., p. 438, it was held that immunity from taxation, where the power is reserved to repeal, etc., does not constitute a contract for such immunity.

In the case of *Tomlinson* vs. *Jessup*, 15 Wall. 454, Mr. Justice Field, speaking for the Court, says:

"The original corporators, or subsequent stockholders, took their interest with knowledge of the existence of this power (the reserved power), and of the possibility of its exercise at any time in the discretion of the Legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference."

Again:

"*Immunity from taxation, constituting in these cases a part of the contract with the Government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made.*"

This decision was rendered in 1872.

Of course, we admit, as said in *Shields* vs. *Ohio*, 95 U. S., p. 319, that sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration; that this would be beyond the sphere of the reserved power, and that the vested rights of property of corporations, in such cases as that, are surrounded by the same sanctions and are as inviolable as in other cases.

In the case of *Greenwood* vs. *Freight Co.*, 105 U. S., p. 14, where a charter of a street railroad company was repealed, there was a reserved power, and it was held that by the

exercise of the repealing power, reserved by such a clause, the charter no longer existed, and whatever validity transactions entered into and authorized by it while it was in force may possess, there could be no new transactions dependent on the special power conferred by the charter. The decision says, in effect, that after such repeal a company could not run its road or a bank loan or issue money.

Suppose the charter of this defendant, a California corporation, is repealed under the reserved power, could not the State impose conditions on such a corporation, and all corporations, to the effect that if they would submit to be taxed in a certain way they might reincorporate? If the law be as the foregoing authorities clearly show, that under the reserved power the privilege of immunity from taxation can be taken away from corporations, is it not apparent why, in the exercise of the same power, the State may not exact from the corporations such taxes as it may impose in its wisdom as a condition for continuing to recognize their corporate character?

In the case of the *County of San Mateo* vs. *Southern Pacific Railroad Company*, 8 Sawyer, 238; 13 Fed. Rep., p. 754, the proposition which we affirm here as to the operation of this reserved power contained in the Constitutions of 1849 and 1879 of the State of California, is fairly stated by the learned Circuit Justice thus: That as a condition in the first place might impose terms as to how the property of the corporation should be taxed, under this reserved power the State still has the right; that the new Constitution in continuing the Southern Pacific Railroad Company, and other railroad corporations, in existence, and at the same time authorizing the taxation of their property upon a different valuation, imposes that condition upon them, and that the subsequent exercise of its franchise by the corporation implies assent to the condition. But the learned Circuit Justice took the negative of the proposition,

and held that the provisions of Article XIII of the Constitution of California are not conditions upon the continued existence of valid corporations, and that the State possesses no power to withdraw corporations from the Federal guaranties; that their property is protected the same as that of natural persons, and the State can only control the franchise. We have endeavored to show that the preponderance of authorities is the other way, and the learned Circuit Justice seems to admit this, for he said:

"The general tendency of modern decisions is to treat corporations, with this reserved power, as subject at all times to the will of the State as to their rights, powers, and liabilities. Such unlimited control, in some cases, would, indeed, lift them not only out of the protection of the fourteenth amendment, but also out of nearly all protection, except such as the legislative pleasure of the hour may permit."

But we are not claiming unlimited control. We are simply claiming that, in the absence of this reserved power, the whole subject of classification or apportionment for the purpose of assessment and taxation belongs to the State; that the law must be a general law, however, including all of a class; that, with the reserved power superadded, it unquestionably belongs to the State. We claim that the provision of the fourteenth amendment that the State shall not deny to any person the equal protection of the laws is not a limitation upon the power of the State as exercised on the subject of taxation. The very words, "the equal protection of the laws," presuppose the existence of laws by the State, and the inhibition contained in the amendment is more against their unequal enforcement, applying to other departments of the Government—the executive and judicial departments. To make it operate as a limitation upon the law-making power, and especially in matters of taxation, is to change the whole theory of republican government. It is to give to a few words an

iconoclastic and talismanic power for evil, undoing what has been so well done by the best of American statesmanship from the foundation of the Government up to the year 1866.

Under the Constitution of 1849 and the Constitution of 1879 there is a reserved power to alter and repeal the charters of corporations. It will be claimed, however, that as railroad corporations can be formed under the Constitution of California only under general laws, and as general laws may be altered and repealed from time to time without any reservation, a succeeding Legislature having as much power as a preceding one, that this reserved power amounts to nothing at all. In other words, that its insertion in the Constitution is a mistake—a meaningless, glittering generality. We have read with very little profit the decision in the *Dartmouth College Case*, if the chartered privileges of that corporation could be taken away by any general law. They were protected, and declared protected, under the clause against contractual impairment in the Constitution of the United States. It was suggested by Judge Story that this difficulty might in the future be avoided by an insertion in the State Constitution of this reserved power. The States were quick to adopt this suggestion, and we presume in almost every State Constitution this reserved power stands forth in bold relief. It never occurred to the framers of those Constitutions that this was a mistake, a meaningless form, or an empty symbol.

This reserved power has virtue; and were it not inserted in State Constitutions, the charters of private corporations could not be taken away at the whim and caprice of State Legislatures. But it will be claimed that even if all this is admitted, still this reserved power, although existing at the time of the adoption of the fourteenth article of amendment, is overriden by the provision therein against denying the equal protection of the laws, and that, therefore, there

is no parallelism between the two cases. Here, while denying that the equality clause affects the subject of taxation, but admitting, for the sake of argument, that it does, the conclusion does not follow that there is no parallelism between the two cases.

In the one case there was the provision against impairing the obligation of a contract. In the case at bar it is assumed that there is a provision against denying the equal protection of the laws.

How is it that the provision in the Constitution of the United States against impairing the obligation of a contract can be avoided by the reserved power, and the provision against denying the equal protection of the laws, so far as it affects taxation, cannot be avoided by this same reserved power? And to put the matter in a stronger light, this reserved power in the former case was inserted in State Constitutions long after the provision was inserted in the Constitution of the United States against impairing the obligation of a contract, more than a quarter of a century after, while the reserved power in the latter case was contained in the Constitution of California sixteen years before the equality clause was a part of the Federal Constitution. How is it that one part of the Constitution can retroact and affect State legislation while another part cannot, although it is claimed that both operate by way of limitation on the States?

But we claim that the reserved power became a part of the contract as much as any other part of the contract. Is the fourteenth article of amendment retroactive, and so all-powerful as to override another constitutional provision of equal dignity—that against impairing the obligation of a contract?

Or, again, suppose even such a reserved power should be inserted in a State Constitution after the adoption of the fourteenth amendment, is it not affording the equal protec-

tion of the laws in matters of taxation, for we are treating of taxation, for a corporation voluntarily to take its charter, giving it certain immunities and privileges on condition that it shall be controlled by the State in respect to the amount of taxes which it shall pay in consideration of such immunities and privileges? Is there anything unequal in that? The corporations may be formed under general laws, but they cannot be compelled to become corporations; and any and all persons may form themselves into corporations. Still it will be claimed that this reserved power must act in the way of general laws only, and cannot act in special cases; that local and special laws are inhibited by the Constitution of California in certain enumerated cases, one of which is in the matter of assessment and collection of taxes.

But the assessment of the corporation is by virtue of a provision of the Constitution itself, and not an Act of the Legislature.

Then it will be claimed that the Constitution itself is special on this subject, and denies the equal protection of the laws. But the provision is a general provision, affecting all railroad corporations, and the mortgages which are not made an interest in real estate are all of one class—that is to say, the mortgages of property belonging to railroad and other quasi public corporations. The constitutional provision is not local nor special.

We distinctly disclaim any classification which is purely arbitrary, which is not founded on reason or justice, or the inherent nature of the property, or which violates the principles which underlie all free Governments. The differential demarkation between a private person and these railroad corporations is well defined. They have the power of eminent domain, which no private citizen has, or can have, except for a public purpose; the power of perpetual succession when not limited, which no private citizen has;

their property is affected with a public use, and subject to State or governmental control in their rates of fare and freight. They are entitled to exclusive possession of their track, are not amenable to the ordinary police laws, such as rate of speed, and their stockholders are subject to only a limited liability. *Congress itself endows some with more immunities and privileges than others.*

The case of *Spring Valley Waterworks* vs. *Schottler*, 110 U. S., p. 352, in which Mr. Chief Justice Waite delivered the opinion of the Court, is conciusive here on the question as to the reserved power possessed by the State of California over the San Pablo and Tulare Railroad Company.

The Constitution of California provides as follows:

"ART. XIV, SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided*, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city and town, or the inhabitants thereof, shall be fixed annually, by the Board of Supervisors, or city and county, or city or town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative Acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any Board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city or county, or city or town, in this State, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town, when the same are collected for the public use.

"SEC. 2. The right to collect rates or compensation for

the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

On the twenty-second of April, 1858, the Legislature of California passed an Act in respect to the formation of corporations for the purpose of supplying cities, counties, and towns with water, and under it such corporations were empowered to acquire lands and waters for their works by purchase and condemnation, and, subject to the reasonable direction of the public authorities, to use streets, ways, alleys, and public roads for laying their pipes. The Spring Valley Water Company was formed under this Act, the fourth section of which reads as follows:

"SEC. 4. All corporations formed under the provisions of this Act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city, or town, for family uses so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and shall furnish water to the extent of their means to such city and county, or city, or town, in case of fire or other great necessity, free of charge. And the rates to be charged for water shall be determined by a Board of Commissioners, to be selected as follows: Two by such city and county, or city, or town authorities, and two by the water company, and in case that four cannot agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said Board. If the four Commissioners cannot agree upon a fifth, then the Sheriff of the county shall appoint such fifth person. The decision of a majority of said Board shall determine the rates to be charged for water for one year, and until new rates shall be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this Act and the laws and Constitution of this State."

With this statement of facts it is very easy to understand the following quotation, from the opinion of the Court, which, on account of its importance and applicability to the case at bar, is given somewhat at length:

"The general question involved in this case is, whether water companies in California, formed under the Act of 1858, before the adoption of the Constitution of 1879, have a right, which the State is prohibited, by the Constitution of the United States, from impairing or taking away, to charge their customers such prices for water as may, from time to time, be fixed by a Commission, made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four, or by the Sheriff of the county.

"The Spring Valley Company claims no rights of this character that may not also be claimed by every other company formed under the same Act. That the company must sell at reasonable prices all the water they are able to furnish consumers, and that the prices fixed for the time being by the honest judgment of such a Commission as was specially provided for in the Act, must be deemed reasonable, both by the Company and the public, is not denied. *The dispute is as to the power of the State, under the prohibitions of the Constitution of the United States, to substitute for this Commission another selected without the coöperation of the company, or some other tribunal of a different character, like the municipal authorities of the locality.* The Spring Valley Company claims that it has, under its charter, a right to the maintenance of the Commission which was created by the requisite appointments in 1878; and the object of this suit is to compel the Board of Supervisors to perpetuate that Commission by filling the vacancy that exists in its membership. So that the whole controversy here is as to the right of water companies that availed themselves of the privileges of the Act of 1858 to secure a virtual monopoly of trade in water at a particular place, to demand the appointment of the Commission provided for in that Act, notwithstanding the Constitution of 1879 and the legislation under it.

"The Spring Valley Company is an artificial being created by or under the authority of the Legislature of California. The people of the State when they first established their Government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. The reservation of power to alter or repeal the charters of corporations was not new, for almost immediately after the judgment of this Court in the Dartmouth College Case (*Dartmouth College* vs. *Woodward*, 4 Wheat, 518), the States, many of them in granting

charters, acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and inserted provisions by which such authority was expressly retained. Even before this decision it was intimated by the Supreme Judicial Court of Massachusetts, in *Wales* vs. *Stetson*, 2 Mass. 143, that such a reservation would save to the State its power of control. *In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body.*

"Water for domestic uses was difficult to be got in some parts of the State. Large amounts of money were needed to secure a sufficient supply for the inhabitants in many localities, and as a means of combining capital for such purposes, the Act of 1858 was passed. Other statutes had been enacted before to effect the same object, but it is said they were not such as a company with capital enough to supply San Francisco was willing to accept. The Act of 1858 was thought sufficiently favorable, and the Spring Valley Company, after organizing under it, expended a large amount of money to provide the means of supplying the territory on which San Francisco is built, and made it possible to support a great population there. *All this was done in the face of the limitations of the Constitution on the power of the Legislature to create a private corporation and put it beyond the reach of legislative control, not only as to its continued existence, but as to its privileges and franchises. One of the obligations the company assumed was to sell water at reasonable prices, and the law provided for a special Commission to determine what should be deemed reasonable, both by the consumers and the company, but there is nowhere to be found any evidence of even a willingness to contract away the power of the Legislature to prescribe another mode of settling the same question if it should be considered desirable. In the Sinking Fund Cases, 99 U. S. 700, it was said that whatever rules for the government of the affairs of a corporation might have been put into the charter when granted, could afterwards be established by the Legislature under its reserved power of amendment.*

"Long before the Constitution of 1879 was adopted in California, statutes had been passed in many of the States requiring water companies, gas companies, and other companies of like character, to supply their customers at prices to be fixed by the municipal authorities of the locality, and, as an independent proposition, we see no reason why

such a regulation is not within the scope of legislative power, unless prohibited by constitutional limitations or valid contract obligations. Whether expedient or not, is a question for the Legislature, not the Courts. * * * But it is argued that as the laws in force before 1858 for the formation of water companies, which provided for fixing the rates by the municipal authorities, were not accepted by the Spring Valley Company, and that of 1858, without such a provision, was, it is to be inferred that the State contracted with this company not to subject it to the judgment of such authorities in a matter so vital to its interests. If the question were one of construction only, this argument might have force, but the dispute now is as to legislative power, not legislative action.

"The Constitution of California, adopted in 1849, prohibited one Legislature from bargaining away the power of succeeding Legislatures to control the administration of the affairs of a private corporation formed under the laws of the State. *Of this legislative disability the Spring Valley Company had notice when it accepted the privileges of the Act of 1858, and it must be presumed to have built its works and expended its moneys in the hope that neither a succeeding Legislature nor the people, in their collective capacity when framing a Constitution, would ever deem it expedient to return to the old mode of fixing rates, rather than on any want of power to do so, if found desirable.* The question here is not between the buyer and the seller as to prices, but between the State and one of its corporations as to what corporate privileges have been granted. This power to amend corporate charters is, no doubt, one that bad men may abuse, but when the amendments are within the scope of this power, the Courts cannot interfere with the discretion of the Legislatures that have been invested with authority to make them.

"The organization of the Spring Valley Company was not a business arrangement between the State and the company as contracting parties, but the creation of a new corporation to do business within the State and to be governed as natural persons or other corporations were or might be. Neither are the chartered rights acquired by the company under the law to be looked upon as contracts with the City and County of San Francisco. The corporation was created by the State. All its power came from the State, and none from the city and county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which

grow out of contracts lawfully made, depend alone on the statute under which it was organized and such alterations and amendments thereof as may from time to time be made by proper authority. *The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchise conferred on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal.*"

This decision was rendered in 1883, and there was but one dissent. Mr. Justice Field, in dissenting, says: "The reservation applies only to the contract of incorporation, to the corporate existence, franchises, and privileges granted by the State." But the foregoing case settles the contention, it is believed, forever. It is indisputably true now, under the decision in *Spring Valley Waterworks* vs. *Schottler*, that a State, under its reserved power, may exercise greater control over the business and property of a corporation than it could have exercised over like business and property of natural persons, and that, as the repeal of the general law would put an end to the corporation, the State could prescribe the conditions of its continued existence and require the company to comply with them without any obstruction to its will by reason of the fourteenth amendment.

The San Pablo and Tulare Railroad Company, when it incorporated, must have realized the fact that, despite its outlay in building and equipping its road, it was subject to such conditions as might be imposed by the State in reference to it and other railroad corporations in this matter of assessment of its property without any deduction for a mortgage debt.

The Supreme Court of California had, before this decision, in effect determined that the Act of 1858 above referred to was not a contract.

They have also decided that there is no double taxation under the Constitution of that State. In *Spring Valley Waterworks* vs. *Schottler*, 62 Cal. 114, the Court says: "The

conclusion is reached, that when the law is complied with by assessing all the property of the corporation, which property includes the franchise of the corporation, to assess the shares would be double taxation, because it would be in effect to assess the same property twice for the same tax, *which the Constitution forbids.*" To the same effect is *Burke* vs. *Badlam*, 37 Cal. 594, and *Miller* vs. *Heilbron*, 58 Cal. 134.

The constitutional provision cited before, Section 4, Article XIII, of the Constitution of California, is simply an apportionment into two interests where only one interest existed before. The mortgagor has one interest, the mortgagee has the other. The assessment roll, however, remains the same; nothing is added to it, nothing is subtracted from it. The railroad property is not assessed any higher than it was before such segregation into distinct interests. The railroad does not have to pay any higher or different rate of taxation. In other words, the Constitution in effect says that, as to property of persons other than such as defendant, the equities between them and the mortgagee are adjusted by the Constitution itself; but, that, as to the property of persons such as defendant, they may adjust their own equities with their bondholders. Is there any hardship about this? Suppose it was not feasible to adjust such equities in the latter case by an iron rule of law, or the Constitution, should that prevent an adjustment as between other persons which is entirely practicable? The very fact that it is practicable in the one case and impracticable in the other is the surest defense of the constitutional provision.

It must also be remembered that, even as to *natural persons* and other persons, where property is segregated into distinct interests by the Constitution, for the purposes of assessment and taxation, the taxes so levied are made *a lien both upon the property and the security. They are a lien upon the property of such persons just as much as they are a lien*

on the property of such corporations as defendants, until the taxes are paid, both on the property and the security upon the two interests into which the property has been distributed.

The Constitution is prospective in regard to this distribution, but there is a lien for all the taxes, in respect to all persons, just as before the distribution was made.

The discrimination, therefore, between such corporations as defendants and other persons becomes less and less, "and thin partitions do their bounds divide."

It should also be borne in mind that the Constitution of a State is not to be declared unconstitutional, except on very clear grounds. Every presumption is in favor of the constitutionality of the Constitution of a State and the constitutionality of statutes. On such a proposition it is needless to incumber this brief with an array of authorities. We simply cite from the opinion of the Court delivered by Mr. Chief Justice Waite in *Munn* vs. *Illinois*, 94 U. S., p. 123, where the doctrine is laid down emphatically: "Every statute is presumed to be constitutional. The Courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

Thus far we have argued this case on the basis of Section 4, Article XIII, of the Constitution of California, which makes a difference in respect to the assessment and taxation of the property of railroad and other quasi public corporations, and other property, in that, from the former, mortgages are not permitted to be deducted.

But there is another section of the same Constitution, which it is necessary to refer to, and which will be referred to in the argument of the defendant in error, and which it will claim produces inharmony and antagonism in the Constitution on this subject of taxation.

This section is Section 10 of the same article, and reads as follows:

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

It will be claimed that in this section the basis of discrimination is not whether it is the property of a corporation that is to be assessed, as in Section 4, but whether it is a railroad operated either by an individual or corporation, provided the railroad is operated in more than one county of the State, in which latter event it must be assessed by the State Board of Equalization.

This section is founded on a different permeating idea, which is that the whole road is a unit, where it runs into and is operated in different counties, and should have a unitary assessment, for which no local Board is competent, and for which a State central Board is peculiarly proper, in carrying out the constitutional mandate embodied in Section 1 of the same article, which says: "All property in the State, not exempt under the laws of the United States, *shall be taxed in proportion to its value, to be ascertained as provided by law*," etc.

In Section 10 the subject-matter treated of is different from that in Section 4. It is not whether mortgages constitute an interest in real estate or not, or whether they shall be deducted or not; but it is *in reference to the proper assessing Board*, and whether any particular class of property, such as railroad property, from its inherent nature and uses, where it is operated in more than one county, is and should be a unit, and subjected to a unitary assessment.

Let us consider now the basis of this discrimination in the light of authority.

Under Section 1, quoted *supra*, a railroad should be assessed and taxed as an entirety, in its whole length.

In the case of *The Union Pacific Railway Company* vs. *Cheyenne*, 113 U. S., p. 517, Mr. Justice Bradley says:

"A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation. A separate mile or two of its length is almost valueless by itself. And then its rolling stock has no particular locality, except a constructive one, in the place where the principal office of the railroad company is situated, and it would be manifestly unequal to give to that place the benefit of taxing the whole of it. The plan adopted by the statute avoids these difficulties. It places the power of assessing the value of the whole line (so far as it lies within the territory), including the rolling stock, in the hands of the Board of Equalization, and after they have fixed such valuation, and ascertained what it amounts to per mile for the whole length within the territory, such valuation per mile is certified by the territorial auditor to the clerks of the several counties through which the road passes, so as to give each its *pro rata* share."

In the case of *County of San Mateo* vs. *The Southern Pacific Railroad Company*, vol 13, Federal Reporter, p. 725, Judge Sawyer says:

"Nor do we think" (alluding, I presume, to the learned Circuit Justice and himself) "that the assessment of the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the State by the State Board of Equalization as a unit, and apportioning that amount of assessed value to the several counties in proportion to the number of miles in each, is objectionable on the ground that it denies the equal protection of the laws to the owner of the road. Indeed, this seems to be the only practicable way of assessing a railroad. It is owned and treated as a unit, and can't be otherwise usefully employed. Its income, expenses, and management, and all its operations, are as a unit. Its rolling stock is at one point at one moment, and at another at a different point of time, but it is all working together as a unit to the ac-

complishment of one end. In fragments and isolated parts, the road would be comparatively valueless as property. It is only as a unit that it can properly be considered, or properly taxed. To tax it otherwise, would be to tax it upon principles materially different from those applicable to other property necessarily considered and used as a unit. The character and circumstances of the property are such as seem to justify a classification for this purpose."

In *Porter et al.* vs. *R. R. I. & St. L. R. R. Co.*, 76 Ill., p. 584, the Supreme Court of Illinois says:

"Local improvements may, indeed, vary, and they are required to be assessed by the local Assessors; but the road and its equipment constitute a single, entire property. In determining the value of such property, the question is neither one of original cost, nor of the intrinsic value of the various items of which the road and its equipments are composed, taken separately, but what it is worth with all its capabilities and facilities as a railroad. The franchise extends to the entire corporate property, and it is not possible that it can be divided. It must, if assessed at all, be assessed as an entirety, and this, as we have already shown, may be in connection with the property to which it is attached."

In the *State Railroad Tax Cases*, 92 U. S., p. 608, the Court says:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

And, again, on page 611, the Court says:

"But the contention is, that the rule of treating the road, its rolling stock, and franchises, as a unit, and assessing it as a whole, on which each municipality levies its taxes according to the length of the road within its limits, violates the principles of this section. We have already discussed this question, and are of the opinion that taxes assessed by that rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property."

The section referred to is a section in the Illinois Constitution in respect to taxing in proportion to the value of the property.

And, again, in the course of the decision, the Court says:

"But, as we have already said, a railroad must be regarded for many, indeed, for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and except in its use as one track is of little value."

Desty on Taxation, Vol. 1, pp. 392 and 393.

Cincinnati, Etc., Railway Co. vs. *Commonwealth*, 81 Ky. 492.

It is clear from these authorities, and from the reason of the thing, that the unitary assessment is the only practicable one that can be made in respect to railroads.

Where railroads are operated in more than one county in the State, for the purpose of uniformity and an equitable adjustment of all their rights, there should be some central authority to which the whole matter can be referred for apportionment between the counties. The classification required by Section 10, Article XIII, of the Constitution of California, includes nearly all the railroads in the State. If a railroad on the other hand is located wholly within a county, there is no necessity to refer the assessment to some extra territorial authority, nor is there any apportionment to be made in such a case. The local authorities would naturally have more and better information on the subject of its assessment than any one else.

The classification prescribed by Section 4, and that prescribed by Section 10, are equally proper and within the competency of a State Constitution. They are not variant or conflicting, but are simply different methods of apportionment of taxation, which is an inherent and unsurrendered power of the States.

But in any event, and as conclusive of the whole question, it is confidently submitted that the defendant in error

cannot be heard to complain, because it is not damaged and has been treated like *all other railroads* in the State, as is abundantly shown by the findings.

Finding 9 is as follows:

"*That all railroads owned and operated in more than one county in said State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of said defendant.*" (Record, p. 23.)

The San Pablo and Tulare Railroad is a railroad running into more than one county, and it is here found that it is assessed like other railroads, whether private or corporate.

Finding 12 is equally explicit that no damage has been done. It reads as follows:

"*That the said Board of Equalization, in making said assessment, did not assess the said franchise, roadway, roadbed, rails, or rolling stock of said defendant, or any part thereof, for more than their actual value or more than their actual cash value, and did not, in making up the values of any part of said property so assessed, include the value of any other property of any kind or nature whatever, and did make the said assessment upon the same basis for valuation as all other property in said State is valued for the purpose of taxation.*" (Record, p. 24.)

Findings 6 and 7 show how this assessment was made on railroads owned and operated in more than one county, whether owned by corporations or individuals.

Finding 6 is as follows:

"*That the State Board of Equalization in making the said assessment assessed to and against said defendant the full cost value of said railroad, roadbed, rails, rolling stock, and franchise without deducting therefrom the value of the mortgage or any part thereof, given and existing thereon as aforesaid, to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of said mortgage.*"

Finding 7:

"*That in making said assessment the State Board of Equalization, acting under and by virtue of the power con-*

ferred upon it by the Constitution of the State of California, did not deem or treat such mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon." (Record, p. 23.)

The defendant in error must not only show a mortgage, but also that it has sustained an injury by its not being deducted from the assessed value of its property for the purpose of taxation. The case of *Supervisors* vs. *Stanley*, 105 U. S., p. 305, is decisive of this question. From the findings it appears that defendant's property was assessed the same as the property of all railroads owned and operated in more than one county in the State, whether owned by corporations or individuals, without any deduction by reason of existing mortgages; that its property was not assessed at any greater sum than its actual value, or greater than its actual cash value; that the assessment was made upon the same basis for valuation as all other property in the State is valued for the purpose of taxation; that no governmental franchise, no fences, no steamers were assessed; that the assessment did not include any other of the property or kinds of property mentioned in Section 3665 of the Political Code of the State, as amended March 9, 1883, except the State franchise, roadway, roadbed, rails, and rolling stock, and that before and at the time of the making of said assessment said defendant had full, due, and legal notice thereof, and appeared before the State Board of Equalization, and had a full and legal hearing on the matter of the making of the said assessment.

It does not appear but that said mortgage was executed before the adoption of the Constitution of 1879, when it was perfectly legal for the mortgagor to covenant to pay all taxes, and it does not appear that there was not such a covenant in the mortgage in this case.

In the case of *Beckman* vs. *Skaggs*, 59 Cal. 541, the mort-

gage sought to be foreclosed was executed before the adoption of the present Constitution. The Court says:

"In the year 1880, the mortgage, for the purpose of taxation, was an interest in the land, the tax upon which defendant had agreed to pay. The covenant was that the defendant should pay the tax upon the full value of the land. Under the present Constitution he is assessed only for the value of the land, less the amount of the mortgage debt. The agreement to pay the whole tax was valid when made, and so to construe the provision of the Constitution as that the agreement may not be enforced according to its terms, would be to impair the obligation of a contract."

For fear it may be claimed by the defendant, in spite of the findings already quoted, that in the valuation of its property by the State Board of Equalization, instead of the County Assessor, the Constitution of California and its laws have perpetrated an inequality, obnoxious to the fourteenth article of amendment of the Constitution of the United States, we again quote the Kentucky Tax Cases, *supra*, p. 337, when the Court says:

"There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the Legislature has seen fit to impose."

In the case of *S. F. and N. P. R. R. Co.* vs. *The State Board of Equalization*, 60 Cal., p. 30, the Court says:

"The Constitution of the State requires all property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of property is to be ascer-

tained by one officer or Board and the value of another kind of property by another officer or Board, each clothed with the duty and responsibility of ascertaining the actual value, can be held to operate a deprivation of legal protection to the owners of either kind of property. The State Board in the one case, the Assessors and County Boards in the other, are but different instrumentalities through which the same result is reached—the fair and just valuation by reference to the same standard, and, therefore, the equal and uniform valuation of property for purposes of taxation."

In order that the Court may be fully advised of the provisions of the Constitution of California, and its laws, as having any bearing on the case at bar, we have added an "Appendix" to this brief, giving such provisions as they existed at the time of said assessment, and the litigation growing out of the same, and also a differential summary which we have made, and believe to be correct, in respect to the assessment and taxation of the property of railroads operated in more than one county and the property of other persons, as prescribed by the Constitution and laws of California.

The Circuit Court having erred, in our opinion, in rendering its judgment for the defendant on a special finding which ascertains all the facts of the case, it is respectfully submitted and claimed that this Court should order judgment for the plaintiff without further trial.

Allen vs. *St. Louis Bank*, 120 U. S., p. 20.

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NOTE.—In the foregoing brief the italics are ours.

APPENDIX.

CONSTITUTION.

Sections 1, 2, 4, 9, 10, and 13, of Article XIII, of the Constitution of California, provide as follows:

"SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State.

"SEC. 2. Land and the improvements thereon shall be separately assessed, etc.

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other quasi public corporations, in cases of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property

shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

"SEC. 9. A State Board of Equalization, consisting of one member from each Congressional district in this State, as the same existed in eighteen hundred and seventy-nine, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and eighty-six, and at each gubernatorial election thereafter, whose term of office shall be for four years, whose duty it shall be to equalize the valuation of the taxable property in the several counties of the State for the purposes of taxation. The Controller of State shall be ex officio a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe, as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; *provided*, that no Board of Equalization shall raise any mortgage, deed of trust, contract, or other obligation by which a debt is secured, money, or solvent credits, above its face value. The present State Board of Equalization shall continue in office until their successors, as herein provided for, shall be elected and shall qualify. The Legislature shall have power to redistrict the State into four districts as nearly equal in population as practicable, and to provide for the election of members of said Board of Equalization.

"SEC .10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise,

roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and district.

"SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article."

Section 1 of Article XII provides:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Section 11 of Article I provides:

"All laws of a general nature shall have a uniform operation."

Section 25 of Article I provides:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * * * *

"*Third*—Regulating the practice of Courts of justice.

* * * * * * * *

"*Tenth*—For the assessment or collection of taxes."

STATUTORY PROVISIONS—POLITICAL CODE.

Sections 3617, 3627, 3628, 3629, 3664, 3665, 3669, 3670, 3671, 3672, 3673, 3674, 3676, 3692, and 3693 of the Political Code of California provide as follows:

"SEC. 3617, third subdivision. The term 'improvements,' includes—1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land. [In effect, March 7, 1881.]

"SEC. 3627. All taxable property must be assessed at its full cash value. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be

assessed at the same value. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi public corporations. In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. [In effect March 7, 1881.]

"SEC. 3628. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by section or fractions of sections.

The Assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner, or supposed owner of real property, shall render the assessment thereof invalid. In assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to *bona fide* residents of this State. [In effect March 22, 1880.]

"SEC. 3629. He must exact from each person a statement under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at twelve o'clock M. on the first Monday in March, etc. [In effect March 7, 1881.]

"SEC. 3664. The President, Secretary, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said Board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year:

"1. The whole number of miles of railway in the State, and, when the line is partly out of the State, the whole number of miles without the State, and the whole number within the State, owned or operated by such corporation, person, or association;

"2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the State;

"3. The width of the right of way;

"4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the State;

"5. Number, kind, and value of rolling stock owned and operated in the State;

"6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns;

"7. Number, kind, and value of rolling stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways.

"Also showing, in detail, for the year preceding the first of January:

"1. The gross earnings of the entire road;

"2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental;

"3. The cost of operating the entire (road), exclusive of sinking fund, expenses of land department, and money paid to the United States;

"4. Net income for such year, and amount of dividend declared;

"5. Capital stock authorized;

"6. Capital stock paid in;

"7. Funded debt;

"8. Number of shares authorized;

"9. Number of shares of stock issued;

"10. Any other facts the State Board of Equalization may require;

"11. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given, no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold, for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, power, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same.

"If such statement is not furnished, as above provided, the assessment made by the State Board of Equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final. [In effect March 9, 1883.]

"SEC. 3665. The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all

steamers which are engaged in transporting passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way, are assessed by the Assessor of the county wherein they are situate. Within ten days after the third Monday of August the Board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail to the County Auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the State, and the amount apportioned to the county, or city and county. The Auditor must enter the statement on the assessment roll or book of the county, city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order, stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road districts, or lesser taxing districts in the county, or city and county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the assessed value of said property for taxable purposes in such city, town, township, school, road, or other district, and the clerk of the Board of Supervisors must transmit a copy

of each order or equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provisions of section thirty-six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the County Auditor of the county affected by the change in the assessment of the change made, and the Auditor must note such change upon the assessment book or roll of the county, as directed by the Board. [In effect March 9, 1883.]

"SEC. 3669. Each corporation, person, or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Controller, as other moneys are required to be paid into the Treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person, or association, dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent added, if to be added on or before the first Monday in February, and the filing of notice with the Controller of an intention to begin an action, may, not later than the first Monday in February, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days

within which to demur or answer. At the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento. The Attorney-General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the General Fund of the Treasury, which is hereby appropriated, and the Controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then, or to become, due said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]

"SEC. 3670. After the first Monday of February of each year, the Controller must begin an action in the proper Court, in the name of the People of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'Duplicate Report of Apportionment of Railway Assessments.' The demands for State and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

"(Title of Court.)

"The People of the State of California)
vs.
"(Naming the Defendant.))

"Plaintiff avers that on the — day of — in the year (naming the year), the State Board of Equalization assessed the franchise, roadway, roadbed, rails, and rolling stock of the defendant at the sum of (naming it) dollars. That the Board apportioned the said assessment as follows: To

the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

"That the defendant is indebted to plaintiff for State and county taxes for the year eighteen — in the following sums: For State taxes in the sum of (naming it) dollars, for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as presented in section five hundred and forty of the Code of Civil Procedure.

"(Signed by the Controller or his attorney.)

"On the filing of such complaint the Clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If on such action the plaintiff recover judgment there shall be included in the judgment as counsel fees, and in case of judgment of taxes, after suit brought but before judgment, the defendant must pay as counsel fees such sums as the Court may determine to be reasonable and just. Payment of the taxes on the amount of the judgment in the case must be made to the State Treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the Controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State, and counties, or cities and counties therein named, and that the corporation, person, or association is indebted to the people of the State of California, in the amount of taxes, State and county, and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]

"SEC. 3671. The assessment made by the County Assessor, and that of the State Board of Equalization, as apportioned by the Board of Supervisors to each city, town, township, school, road, or other district in their respective counties, shall be the only basis for taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect.

All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]

"SEC. 3672. The Board of Supervisors of each county must meet on the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalization is disposed of, but not later than the fourth Monday in July. [In effect January 1, 1873.]

"SEC. 3673. The Board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money. [In effect March 22, 1880.]

"SEC. 3674. No reduction must be made in the valuation of property, unless the party affected thereby, or his agent, makes and files with the Board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made. [In effect January 1, 1873.]

"SEC. 3676. Upon the hearing of the application the Board may subpœna such witnesses, hear and take such evidence in relation to the subject pending, as in its discretion it may deem proper. [In effect January 1, 1873.]

"SEC. 3692. The powers and duties of the State Board of Equalization are as follows:

"1. To prescribe rules for its own government, and for the transaction of its business.

"2. To prescribe rules and regulations, not in conflict with the Constitution and laws of the State, to govern Supervisors when equalizing, and Assessors when assessing.

"3. To make out, prepare, and enforce the use of form in relation to the assessment of property.

"4. To hold regular meetings at the State Capitol on the second Monday in each month, and such special meetings as the Chairman may direct.

"5. To annually assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, at their actual value, on the first Monday in March, at twelve o'clock M., and to apportion such assessment to the counties, and cities and counties, in which such roads are located, in proportion to the number of miles of railway laid in such counties, and cities

and counties, in the manner provided for in section thirty-six hundred and sixty-four of said Code.

"6. To equalize the assessment of each mortgage, deed of trust, contract, or other obligation by which a debt is secured, and which affects property situate in two or more counties; and to apportion the assessment thereof to each of said counties.

"7. To transmit to the Assessor of each county, or city and county, its apportionment of the assessments made by said Board upon the franchises, roadways, roadbeds, rails, and rolling stock of railroads; and also its apportionment of the assessment made by such Board upon mortgages, deeds of trust, contracts, and other obligations by which debts are secured, in the manner provided for in section thirty-six hundred and sixty-four of said Code.

"8. To meet at the State Capitol on the third Monday in August, and remain in session from day to day (Sundays excepted) until the third Monday in September.

"9. At such meeting to equalize the valuation of the taxable properties of the several counties in this State for the purpose of taxation; and to that end, under such rules of notice to the Clerk of the Board of Supervisors of the county affected thereby as it may prescribe, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value in money of the property assessed, and to fix the rate of State taxation, and to do the things provided in section thirty-six hundred and ninety-three of said Code.

"10. To visit as a Board, or by the individual members thereof, whenever deemed necessary, the several counties of the State, for the purpose of inspecting the property and learning the value thereof.

"11. To call before it, or any member thereof, on such visit, any officers of the county, and to require them to produce any public records in their custody.

"12. To issue subpœnas for the attendance of witnesses or the production of books before the Board, or any member thereof, which subpœnas must be signed by a member of the Board, and may be served by any person.

"14. To appoint a Clerk, prescribe and enforce his duties. The Clerk shall hold his office during the pleasure of the Board.

"15. To report to the Governor, annually, a statement showing:

"*First*—The acreage of each county in the State that is assessed.

"*Second*—The amount assessed per acre.

"*Third*—The aggregate value of all town and city lots.

"*Fourth*—The aggregate value of all real estate in the State.

"*Fifth*—The kinds of personal property in each county, and the value of each kind.

"*Sixth*—The aggregate value of all personal property in the State.

"*Seventh*—Any information relative to the assessment of property and the collection of revenue.

"*Eighth*—Such further suggestions as it shall deem proper.

"16. To keep a record of all its proceedings. [In effect April 3, 1880.]

"SEC. 3693. When, after a general investigation by the Board, the property is found to be assessed above or below its full cash value, the Board may, without notice, so determine, and must add to or deduct from the valuation:

"1. The real estate.

"2. Improvements upon such real estate.

"3. The personal property, except money, such per centum respectively as is sufficient to raise or reduce to its full cash value." [In effect April 3, 1880.]

STATUTES AS TO ORGANIZATION OF CORPORATIONS—CIVIL CODE.

SEC. 284. Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; all other corporations are private.

SEC. 285. Private corporations may be formed by the voluntary association of any five or more persons in the manner prescribed by this article. A majority of such persons must be residents of this State.

SEC. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

SEC. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

SEC. 290. Articles of incorporation must be prepared, setting forth—

1. The name of the incorporation.

2. The purpose for which it is framed.

3. The place where its principal business is to be transacted.

4. The term for which it is to exist, not exceeding fifty years.

5. The number of its Directors or trustees, which shall not be less than five nor more than eleven, and the names and residence of those who are appointed for the first year. * * *

6. The amount of its capital stock, and the number of shares into which it is divided.

7. If there is a capital stock, the amount actually subscribed, and by whom.

SEC. 291. The articles of incorporation of any railroad, wagon road, or telegraph organization must also state—

1. The kind of road or telegraph intended to be constructed.

2. The place to and from which it is intended to be run, and all the intermediate branches.

3. The estimated length of the road or telegraph line.

4. That at least ten per cent of the capital stock subscribed has been paid in to the Treasurer of the intended corporation.

SEC. 292. The articles of incorporation must be subscribed by five or more persons, a majority of whom must be residents of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

SEC. 293. Each intended corporation named in section two hundred and ninety-one, before filing articles of incorporation, must have actually subscribed to its capital stock for each mile of the contemplated work the following amounts, to wit:

1. One thousand dollars per mile of railroad.

2. One hundred dollars per mile of telegraph lines.

3. Three hundred dollars per mile of wagon roads.

SEC. 294. Before the articles of incorporation of any corporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation to a Treasurer elected by the subscribers ten per cent of the amount subscribed.

SEC. 295. Before the Secretary of State issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the President, Secretary, or Treasurer named in the articles that the required amount of the capital stock thereof has been actually subscribed, and ten per cent thereof actually paid to the Treasurer for the benefit of the corporation.

SEC. 296. Upon filing the articles of incorporation in the office of the County Clerk of the county in which the principal business of the company is to be transacted, and a

copy thereof, certified by the County Clerk, with the Secretary of State, and the affidavit mentioned in the last section, where such affidavit is required, the Secretary of State must issue to the corporation, over the great seal of the State, a certificate that a copy of the articles containing the required statement of facts has been filed in his office; and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or in this Code otherwise specially provided.

EMINENT DOMAIN STATUTES—CODE OF CIVIL PROCEDURE.

SEC. 1237. Eminent domain is the right of the people or Government to take private property for public use. This right may be exercised in the manner provided in this title.

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines. * * *
2. Public buildings. * * * (State purposes.)
3. Public buildings. * * * (Counties, cities, etc.)
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.
5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.
6. By-roads leading from highways to residences and farms.
7. Telegraph lines.
8. Sewerage of any incorporated city. * * *

SEC. 1242. In all cases where land is required for public use, the State, or its agents in charge of such use, may survey and locate the same. * * *

SEC. 1243. All proceedings under this title must be brought in the Superior Court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

SEC. 1244. The complaint must contain: 1. The name of the corporation, association, Commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff. * * *

A DIFFERENTIAL SUMMARY IN RESPECT TO THE ASSESSMENT AND TAXATION OF THE PROPERTY OF RAILROADS OPERATED IN MORE THAN ONE COUNTY, AND THE PROPERTY OF OTHER PERSONS, AS PRESCRIBED BY THE CONSTITUTION AND LAWS OF CALIFORNIA.

In the former case, a sworn statement is required to be furnished the State Board of Equalization, which is the assessing Board, on or before the first Monday in April of each year, giving in detail the required facts for the year ending on the first Monday in March. If the statement is not furnished, the assessment becomes final. The Board meets at the State Capitol, and continues in open session from the first to the third Monday in August to complete the assessment. In the latter case, a sworn statement is also required to be furnished to the County Assessor, showing the required facts for the year ending on the first Monday in March. The Assessor must complete his assessment book or roll by the first Monday in July of each year. In the former case, between the third Monday in August and the third Monday in September, the owner of a railway assessed by the State Board of Equalization, if dissatisfied with its assessment, may apply to the Board to have the same corrected in any particular, and the Board may increase or lower the assessment, so as to equalize the same with the assessment of other property in the State, the Board thus changing from an assessing Board to an equalizing Board. In the latter case, after the assessment book is completed, the Clerk of the Board of Supervisors

gives notice of the time that the Board will meet to equalize assessments. The Board of Supervisors meet, on the first Monday in July, and sits as an equalizing Board not later than the fourth Monday in July, with power, after giving notice as by rule it may prescribe, to increase or lower any assessment, except such as is to be made by the State Board; but *they are not to lower unless a verified application is filed, showing the facts upon which it is claimed.* In the former case, the State Board has the power to apportion their assessments to each of the counties, in proportion to the number of miles of railway laid in such counties, and to transmit the apportionment to the County Assessor; this apportionment is to be made within ten days after the third Monday in August, and they must within this time transmit to the County Auditor a statement showing the assessed value per mile, and other facts, together with the amount apportioned to the county. In the latter case, the County Auditor enters this statement on the assessment book. On the first Monday in October the Board of Supervisors make an order declaring the number of miles of track, the assessed value per mile as made by the State Board, and the assessed value in each city or lesser taxation district, through which the railway runs, which constitutes the assessed value for such districts, and the Clerk of the Board transmits a copy to the authorities of such districts.

And here it should be added that the railway property is taxable upon said assessment at the same rates as the property of individuals.

In the former case, the State Board prepares what is called a "Record of Assessment of Railways" and a "Record of Apportionment of Railway Assessments," and before the third Monday of October must transmit to the Controller duplicates of these records, the record of apportionment, showing amount of taxes due the State, and amount due each of the counties. These duplicates con-

stitute the warrants for the Controller to collect the State and county taxes levied upon such property assessed by the Board, and the Controller computes the exact amount due from a statement which is to be furnished him by the Board of Supervisors as to the rate of taxation levied by them for county purposes.

Within ten days after the fourth Monday in October the Controller is to publish a notice that such taxes are due, and unless paid to the State Treasurer at the State Capitol prior to the last Monday in December, when they become delinquent, five per cent will be added.

In the latter case, as soon as the Auditor receives from the State Board a statement of the changes made by them, he makes the corresponding changes on the assessment book, and computes the exact amount due, and on or before the fourth Monday in October delivers a copy of the assessment book, corrected, to the Tax Collector. Within ten days after its receipt the Tax Collector gives notice that the taxes are due, and if not paid by the last Monday in December will become delinquent, and five per cent added, stating time and place where payment may be made. In the former case, when taxes are collected, the State's portion is to be distributed by the Treasurer to each fund entitled thereto, and the portion belonging to the counties is placed in a fund called "Railway Tax Fund," to the credit of the proper county. In the settlements made with the Controller by the County Treasurers they get warrants from the Controller for so much of the Railway Tax Fund as is placed to the credit of their several counties. After the first Monday in February of each year the Controller must bring an action in the name of the people for the collection of such taxes assessed by the State Board as are delinquent, and demands for State and county tax may be united in one action.

In the latter case there is a provision for the Tax Col-

lector settling with the Auditor for all moneys collected for the State or county, and paying the same over to the Treasurer. He delivers a delinquent list to the Auditor, the Auditor charging him with the amount thereof, and within three days thereafter the Tax Collector receives the list, duly certified, from the Auditor. The Tax Collector publishes the delinquent list, and with it a notice that unless the delinquent taxes are paid the real property on which such taxes are a lien will be sold at public auction.

FILED
MAR 8 1890

Supreme Court of the United States.

OCTOBER TERM 1889.

No. ~~1467~~. 257

THE PEOPLE OF CALIFORNIA,

Plaintiffs in Error,

vs.

THE SAN PABLO & TULARE RAILROAD COMPANY,

Defendants in Error.

Copy of Brief of Messrs. Brown & Haymond filed in the Supreme Court of California in a cause recently heard and now* sub-judice *between the same parties, and involving the same questions arising in this case and submitted here, in support of the contentions of the Defendant in Error.

THOMAS McGILL & Co., Printers.

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IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY,
Defendant and Respondent.

The Same
vs.
Northern Railway Company.

The Same
vs.
San Pablo and Tulare Railroad Company.

The Same
vs.
The Southern Pacific Railroad Company.

The Same
vs.
California Pacific Railroad Company.

STATEMENT OF CASE.

For the convenience of Court and counsel, and in order to place the facts at once before the Court, I have deemed it best to here copy one Complaint, one Demurrer, and the Opinion of the Court below, as all the complaints are in the form prescribed by Sec. 3670 of the Political Code.

COPY COMPLAINT.

"In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant,

Plaintiff avers that on the 14th day of August, in the year eighteen hundred and eighty-six, the State Board of Equalization assessed the franchise, roadway, road-bed, rails and rolling stock of the defendant at the sum of $20,000,000. That the Board apportioned the said assessment as follows: To the County of Alameda, the sum of $2,607,230; to the County of Butte, the sum of $1,404,758; to the County of Fresno, the sum of $1,877,068; to the County of Merced, the sum of $1,147,219; to the County of Nevada, the sum of $944,309; to the County of Placer, the sum of $3,519,698; to the County of Sacramento, the sum of $1,279,890; to the County of San Joaquin, the sum of $1,771,555; to the County of Santa Clara, the sum of $265,343; to the County of Shasta, the sum of $1,835,550; to the County of Sierra, the sum of $67,116; to the County of Stanislaus, the sum of $706,437; to the County of Sutter, the sum of $312,168; to the County of Tehama, the sum of $1,265,530; to the County of Tulare, the sum of $423,925; to the County of Yuba, the sum of $495,411, and to the City and County of San Francisco, the sum of $76,793.

That the defendant is indebted to plaintiff for State and County taxes for the year eighteen hundred and eighty-six, in the following sums: For State taxes in the sum of $112,000; for County taxes of the County of Alameda, in the sum of $16,225.34; for County taxes of the County of Butte, in the sum of $13,154.46; for County taxes of the County of Fresno, in the sum of $18,582.97; for County taxes of the County of

Merced, in the sum of $14,225.61; for County taxes of the County of Nevada, in the sum of $16,430.97; for County taxes of the County of Placer, in the sum of $34,845.01; for County taxes of the County of Sacramento, in the sum of $8,035.21; for County taxes of the County of San Joaquin, in the sum of $7,733.65; for County taxes of the County of Santa Clara, in the sum of $1,575.82; for County taxes of the County of Shasta, in the sum of $31,020.79; for County taxes of the County of Sierra, in the sum of $1,436.28; for County taxes of the County of Stanislaus, in the sum of $5,449.32; for County taxes of the County of Sutter, in the sum of $1,685.70; for County taxes of the County of Tehama, in the sum of $15,-620.77; for County taxes of the County of Tulare, in the sum of $4,832.74; for County taxes of the County of Yuba, in the sum of $11,417.03; and for City and County taxes of the City and County of San Francisco, in the sum of $776.37; with five per cent. added to each of said several sums, for non-payment of taxes.

Plaintiff demands judgment for said several sums, with five per cent. added thereto, together with costs and counsel fees, as allowed by law, and prays that an attachment may issue in form, as prescribed in Section five hundred and forty, of the Code of Civil Procedure.

D. M. DELMAS,
Attorney for Plaintiff and the Controller."

COPY DEMURRER.

(Title of Cause.)

"The defendant comes and demurs to the complaint of the plaintiff herein, and assigns the following grounds, to wit:

First.—That the Court has no jurisdiction of the subject-matter of the action, nor the person of the defendant herein.

Second.—That the plaintiff has not the legal capacity to sue herein, for the following reasons: That Sections 3668–3669 and 3670 of the Political Code, under the provisions of

which said action was instituted, are unconstitutional and void in this: that said sections are in contravention of Subdivisions 3rd and 10th of Section 25 of Article IV of the Constitution of the State of California; they also are in contravention of Section 21 of Article I of the Constitution of the State of California, and of Section I of Article XII of the Constitution of the State of California; that said sections of the Political Code are in contravention of Section one of the 14th Amendment of the Constitution of the United States; that so far as the assessment of railroad property is concerned, Sections 4 and 10 of Article XIII of the State Constitution, upon which the said action is founded, are in contravention of Section one of the 14th Amendment of the Constitution of the United States.

Third.—That several causes of action have been improperly united.

Fourth.—That several causes of action have been improperly united, which are not separately stated in the complaint; that is to say,

I.

A cause of action for State taxes.

II.

A cause of action for county taxes of the county of Alameda.

III.

A cause of action for county taxes of the county of Butte.

IV.

A cause of action for county taxes of the county of Fresno.

V.

A cause of action for county taxes of the county of Merced.

VI.

A cause of action for county taxes of the county of Nevada.

VII.

A cause of action for county taxes of the county of Placer.

VIII.

A cause of action for county taxes of the county of Sacramento.

IX.

A cause of action for county taxes of the county of San Joaquin.

X.

A cause of action for county taxes of the county of Santa Clara.

XI.

A cause of action for county taxes of the county of Shasta.

XII.

A cause of action for county taxes of the county of Sierra.

XIII.

A cause of action for county taxes of the county of Stanislaus.

XIV.

A cause of action for county taxes of the county of Sutter.

XV.

A cause of action for county taxes of the county of Tehama.

XVI.

A cause of action for county taxes of the county of Tulare.

XVII.

A cause of action for county taxes of the county of Yuba.

XVIII.

A cause of action for city and county taxes of the city and county of San Francisco.

Fifth.—That the complaint does not state facts sufficient to constitute a cause of action.

Sixth.—That the complaint is ambiguous, unintelligible and uncertain in this: That it does not appear how or when defendant became indebted for taxes; that it does not appear how or when five per cent was added.

Wherefore, defendant prays judgment against plaintiff, and that it may have its costs in this behalf expended.

H. S. BROWN,
Attorney for Defendant."

OPINION OF THE COURT BELOW.

These actions were instituted to recover taxes alleged to be due to the State and the several counties through which the several roads are located. Each complaint contains but a single count, and it is in the form prescribed by Section 3,670, P. C.

The constitution of the State prescribes two modes of assessing property subject to taxation. Both methods are set forth in Section 10 of Article XIII of the Constitution, which reads as follows:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling-stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Thus all the taxable property of or within the State, except the franchise, roadway, road-bed, rails and rolling-stock of railroads operated in more than one county, must be assessed in the county, city, city and county, town, township or district in which it is situated.

The complaints in these actions have been demurred to upon the various grounds mentioned in Section 430, C. C. P., and the assessments and mode of collecting the taxes upon railroads are attacked on the ground that the whole method is a violation of the Fourteenth Amendment of the Constitution of the United States, and of various provisions of the State Constitution, which will be hereafter particularly referred to.

The view taken herein of the method prescribed for the collection of railroad taxes, renders it unnecessary to consider the mode

of assessing this kind of property, as the Supreme Court of this State has passed upon that question heretofore.

It is claimed by the defendants, first, that Sections 3,668, 3,669 and 3,670, P. C., are unconstitutional and void, because they conflict with Sub-division 3, of Section 25, of Article IV, of the Constitution of the State.

Section 25. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say * * * * Third—Regulating the practice of Courts of Justice."

It is urged that the Code of Civil Procedure affords a complete system of practice in all civil actions; that it defines who shall be parties to an action; when and how an action shall be commenced; what the complaint shall contain; when it may be demurred to and how answered, and when it shall be verified, and what costs shall be allowed on judgment and when an attachment shall issue and judgment be enforced.

The adoption of a particular form of complaint for the recovery of a moneyed judgment against a particular class of defendants, especially when that complaint would be insufficient under the Code of Civil Procedure, is a plain and palpable violation of this provision of the Constitution.

Section 426, C. C. P., among other things, requires the complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language. Do the complainants in question, copied from Section 3,670, P. C., comply with this requirement? The complaint simply avers that the State Board of Equalization assessed the franchise, roadway, road-bed, rails and rolling-stock of the defendant at the sum of — dollars, and that the Board apportioned the said assessment as follows: to the county of — so many dollars, and so on, naming each county. There is no averment from first to last that any tax was ever levied by the State Board or by any of the named counties, nor that the tax is delinquent or unpaid. The assessment of the property and the apportionment of the same to the various counties are simply steps necessarily taken prior to the levy of the tax. An assessment without a levy of a tax would no more create a liability to pay a certain or any tax than would a levy of a tax without any assessment. They are both equally important and necessary in order to be binding.

The averment that defendant is indebted to the plaintiff for such an amount of taxes for the year 1886, is not such a statement of a cause of action as is required by the C. C. P. It is a conclusion of law at best, depending entirely upon the facts.

The complaint is singularly lacking in other respects. There is no averment that the defendant is a corporation; neither is there any averment that the defendant is the owner or possessor of the property in question, nor any other allegation that even tends to show defendants liability.

But the defects of these complaints do not end here. From

three to eighteen different causes of action are improperly united in them in one count, when they should have been separately stated. This defect becomes more apparent when the mode of designating the amount and levying of the various taxes is considered. By the provisions of Section 3,696, P. C., the State Board of Equalization is required between the first and third Mondays in September of each year to determine the rate of State tax to be levied and collected upon the assessed valuation of the property of the State, and said Board must immediately thereafter transmit to the Board of Supervisors and County Auditor of each county a statement of such rate. After the receipt of this information, to wit, on the first Monday of October, the Board of Supervisors of each county must fix the rate of the county, designating the number of cents of each hundred dollars of property levied for each fund, and must levy the State and county taxes upon the taxable property of the county. (Section 3,714, P. C.)

By the provisions of Section 3,715, P. C., the action of the State Board of Equalization, in fixing the rate of taxation for State purposes, is, in the absence of action by the Board of Supervisors, a valid levy of the rate so fixed. The rate of State taxes would be the same in each county, but the rate of the county tax would depend entirely upon the wants of the county and the will of the Board of Supervisors, and could not be the same in any two counties except by accident, as each cause of action for county taxes would depend entirely upon the action of as many different Boards of Supervisors as there are counties, in which the defendant's railroad is operated. It would seem, upon general principles, as well as by the provisions of the Code of Civil Procedure, to be essential and absolutely necessary to have said several causes of action separately stated.

The remaining questions upon this point are first, when the Legislature has declared a complaint to be sufficient that lacks the essential elements of good pleading, does it bind the courts? and second, is not such legislation in conflict with Sub-division 3, Section 25, Article IV of the State Constitution?

As to the first of these two questions, it is settled that it is clearly within the power of the Legislature to establish general rules and prescribe the mode and manner of pleading in the absence of Constitutional restriction, and may by special laws prescribe different rules and modes in different classes of cases. These rules are and must be subject to interpretation by the judiciary. If the Legislature attempts to determine in advance that a certain pleading established by a certain law or any law is a sufficient pleading, it is a clear usurpation of the functions of the judiciary. The case of *Whiting* vs. *Townsend*, 57 Cal., 515, is not an authority that sustains the contention of plaintiff. That was an action brought to enforce a street assessment lien, and proceedings were had on a supplemental Act to certain Acts concerning the City and County of San Francisco, passed April 1, 1872. See

Statutes of 1872, pages 809 to 816. Section 13, among other things, provides that in bringing an action to recovor street assessments, the complaint need not show any proceedings prior to the issuance of the assessment, diagram and certificate, but it shall be legally sufficient if it shows the title of the Court in which the action is brought by the parties plaintiff and defendant, the date of issuance of the assessment, the date of recording thereof, the book and page where recorded, a general statement of the work done, the description of the lot or lots sought to be charged with the assessment, the amount assessed thereon, and that the sum remains unpaid, and the proper prayer for relief. The cause of action having arisen and suit having been commenced before there was any constitutional inhibition, the Court held that the Legislature had the right to provide such a rule of pleading.

Does the law conflict with Sub-division 3 of Section 25, Article IV of the Constitution? It certainly regulates the practice of Courts of Justice in the few cases named. It prescribes an exact form of complaint, differing in every essential particular from that prescribed by the Code. It provides for an attachment without affidavits or bond. It provides for the payment of counsel fees if the suit be settled before judgment. In case of judgment it provides that the judgment shall include counsel fees in such sum as the Court may deem reasonable, none of which things can be done under the Code of Civil Procedure. The conclusion is irresistible that the legislation in question is unconstitutional and void. It is also urged that the legislation in question is in contravention of Sub-division 10, Section 25, Article IV of the State Constitution, which provides that the Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * * Tenth—"For the assessment or collection of taxes." So far as the assessment of railroad property is concerned, by the State Board of Equalization, as the Constitution itself makes a different provision for the assessment of railroad property operated in more than one county from that required for the assessment of all other property in the State, and as the Political Code simply follows the provisions of the Constitution, it is plain that the assessments are not assailable under the subdivision above quoted. But while a separate assessment of their property is directed by State instead of county officers, and is therefore not assailable upon State Constitutional grounds, yet there is nothing in the Constitution to indicate that the taxes were intended to be collected upon such roads operated in more than one county in any manner different from the collections of taxes upon other property. On the contrary, it is very apparent that it was the intention of the framers of the Constitution that all taxes levied thereon were to be collected in the same manner and by the same officers as other taxes. When Section 10, Article XIII, of the Constitution, before cited, required the State Board of Equalization, after assessing any such railroad, to apportion said

assessment to the counties, cities and counties, cities, towns, townships and districts, in which such railroads are located in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts, it was for the undoubted purpose of allowing the county, city and county, city, township and district officers, not only to levy, but to collect the tax the same as collected upon other property, and it will be seen by reading the last sentence of Section 3,671, P. C., that even now the taxes upon township, road, school or other local districts shall be collected in the same manner as the county taxes. All taxes levied upon all property of the State of California, except State and county taxes levied upon railroads operated in more than one county, are payable in the county where the property is situated and payable to the county tax collectors or city and county, city, township or district tax collectors. It is claimed by the owners of such railroads that under the general revenue laws all other tax-payers, not only have the right to pay the taxes in the county in which their property is situated, but should the tax become delinquent and advertised as such, they can still pay the taxes and percentage and the sum of 50 cents costs on each piece of property so advertised, without further costs; and in case the property is sold for non-payment of taxes they can redeem the same at any time twelve months thereafter and thirty days after receiving notice from the purchaser that he will apply for a deed.

They also claim that rules applying to the owners of railroads operating in more than one county as to the collection of State and county taxes are specially onerous, unconstitutional and void in the following particulars:

First—The requirement to pay said State and county taxes at the State Capitol to the State Treasurer, upon the order of the Controller.

Second—The commencement of a suit to collect such taxes without offering the property at first for sale as in other cases.

Third—Making the defendant liable to pay not only the ordinary costs of suit, but counsel fees also.

Fourth—The issuing of an attachment and attaching any and all property not exempt from execution, and, in case of judgment, selling the same instead of enforcing the lien against the property itself.

Fifth—In case of the sale of the property under execution, limiting the time of repayment to six months, instead of twelve months, when sold by the Tax Collector.

If this is a special law, there is no doubt that it is unconstitutional and void. The Court is not without authority upon this point. *Ex parte* Westerfield, 55 Cal., 550, involved the construction of an Act of the Legislature entitled, "An act to regulate and provide a day of rest in certain cases, approved April 16, 1880." The Act provided that it should be unlawful for any person engaged in the business of baking to engage or permit others in his employ

to engage in the labor of baking, for the purposes of sale, between the hours of 6 o'clock P. M. on Saturday, and 6 o'clock P. M. on Sunday, etc. The petitioner violated this law, was arrested therefor, whereupon a writ of *habeas corpus* was sued out and the same was heard by the Supreme Court in banc. Mr. Justice Myrick, in delivering the opinion, said: "This is special legislation. A certain class is selected. Now, if there be authority to restrain labor on some one day, it must be, if at all, under a general law restraining labor on that day."

Justice McKinstry, in concurring, said: "But admitting the constitutionality of general laws prohibiting all labor upon Sunday, or upon any other day, I think the Act of April 16, 1880, is a special law within the meaning of those terms as employed in Section 25, Article IV, of the present Constitution. * * * To say that every law is general within the meaning of the Constitution, which bears equally upon all to whom it is applicable, is to say that there can be no special laws."

This decision and the language quoted is peculiarly applicable to the case under consideration. The class of persons affected by the Baker's Act, numerically considered, amounted to hundreds, if not thousands, while the number of railroads operated in more than one county is less than a score. All the Justices except Justice Ross and Justice McKee, who did not hear the argument, concurred in the judgment. But aside from the number of persons affected, the legislation in question is, if possible, more objectionable than the Baker's Act, for the reason that that Act applied to all persons of that class, while this is applicable only to a portion of a class. There are a number of well-known classes of railroads—there are broad-gauge railroads, narrow-gauge railroads, steam railroads, electrical railroads, gravitation railroads, horse railroads, and cable railroads, but the legislation in question does not relate to any of these well-known classes of railroads. As well might the legislature arbitrarily make Sections 3668, 3669, 3670 applicable to railroads 10, 20, 50, 100 or any other number of miles in length, and then claim that the law was general and not special, as to claim that the present law is a general law. In *Earle* vs. *The Board of Education of San Francisco* (55 Cal., 489), the Court in banc passed upon the constitutionality of an act which added a new section to the Political Code, which established the salaries to be paid teachers in the public schools in all consolidated cities and counties containing more than 100,000 inhabitants. The Court held that the section violated Section 25 of Article IV of the Constitution, which prohibits special and local legislation.

Upon principle and authority, the conclusion is irresistible that Sections 3669 and 3670 of the Political Code, as amended in 1883, are in direct conflict with Section 25, Article IV, of the Constitution, and are therefore void.

It is also claimed that the legislation in question is in direct

contravention of Section 1, Article XII, of the Constitution, which reads as follows: "Corporations may be formed under general laws, but shall not be created under special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

The old Constitution (Section 31, Article IV) had the following: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

It will be observed that so far as private corporations are concerned the provisions of the two Constitutions are the same, though clothed in different language. It has been claimed by some that this reservation of power to alter, amend or repeal conferred ample authority upon the legislature to adopt the system for the collection of taxes from railroad companies now under discussion. This reservation of power may be so wielded as to completely change all corporation laws, or strike them from the statute books by an absolute repeal of all laws bearing upon that subject, and therefore prohibit the formation of such corporation, but in altering or amending such laws, it cannot free some of a class and burden the others. All must be treated alike in this respect or the law becomes special and not general, and infringes upon the Constitution.

This question has been carefully considered and determined in the great case of *The City and County of San Francisco* vs. *The Spring Valley Water Works*, reported in 48th Cal., 493. Mr. Justice Crockett, who delivered the opinion of the Court, in speaking of corporations, said:

"They can only be formed under general laws, and can exercise no powers except such as are derived from general laws. * * * The general laws under which they were formed, and such others as shall afterwards be enacted, must alone define their rights and powers. On this theory, all private corporations formed for similar purposes, will stand upon the same footing, enjoy the same rights and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all."

Justice McKinstry, in a concurring opinion, said: "The Legislature could neither confer a benefit nor impose an obligation on the Spring Valley Water Works, not conferred or imposed on all water companies by the general law. To confer a special benefit or impose a special obligation would be equally destructive of the uniformity which it is the object of Section 31 of Article IV of the Constitution to secure."

The same learned Justice, on page 532, says: "The rights and duties of all corporations formed under the general law providing for the incorporation of water companies are fixed and determined

by its terms, and can only be changed or modified by amendment of the general law. And every such amendment must be applicable to all corporations created under the general law."

In the case of the *Spring Valley Water Company* vs. *Bryant*, 52d Cal., 132, the Supreme Court held that certain Acts of the Legislature, so far as they attempted to provide a mode of fixing the rates to be charged by companies furnishing water to the inhabitants of San Francisco, differing from that provided for establishing the rates to be allowed to other companies formed under the general laws, are unconstitutional and void.

The same doctrine was laid down in the case of the *Waterloo Turnpike Road Company* vs. *J. H. Cole*, 51st Cal., 381.

In the case of the *Omnibus Railroad Company* vs. *Baldwin*, Mr. Justice McKinstry, after stating that this section of the Constitution had been judicially considered in the aforementioned case, and reaffirming the same doctrine, said: "I do not propose to fortify the reasoning of Mr. Justice Crockett in *San Francisco* vs. *Spring Valley Water Works*. In itself, eminently satisfactory, it accords with established canons of constitutional and statutory construction. My purpose is simply to show that, to the extent above intimated, the construction of the provision of the Constitution has been settled by the highest tribunal of the State." This point having been finally settled by the highest tribunal of the State, the remaining question is: Does the legislation in question apply to all railroad corporations organized under the general law? If so, then the reservation of the power to alter or amend might be invoked to sustain it; but if, on the contrary, it only affects a portion of said railroad corporations, then it is unconstitutional and void. The general law for the incorporation of railroad companies, under both the old and new Constitutions, is the same whether the object was to construct in one or all the counties of the State. All had the same powers and duties and were subject to the same obligations. There are in this State nearly, if not quite, as many railroads operated only in one county, as there are operated in more than one county.

The provision of the Political Code, before referred to, does not impose upon the railroads operated in one county the duties or obligations imposed upon those operated in more than one county. The three county railroads in Los Angeles, the three county railroads in Alameda, the three county railroads in Contra Costa, the two county railroads in Santa Cruz, the two county railroads in Humboldt, the one county railroad in Colusa, and the one county railroad in Tulare, are not compelled to go to the State Capitol and there pay their State and county taxes to the State Treasurer, after obtaining an order from the Controller for the State Treasurer to receive the same; and should the tax on their railroads become delinquent, they are not subject to a suit and attachment and costs of suit and counsel fees, until their roads, the property assessed, and upon which the tax has been levied, have been ad-

vertised and offered for sale, and no bidders are found to take the same. The tax upon their property can only be made out of the identical property assessed, provided any bidder shall take it and pay the tax, percentage and costs, and after that time he has at least twelve months in which to redeem.

Under the decisions before cited, the reservation of the power to alter, amend or repeal, so far from sustaining the section of the Political Code in question, determine that the said sections are unconstitutional.

But we now come to the last question herein considered. It is claimed that the provisions of the State Sections 3,668, 3,669, and 3,670 are in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States; that the State denies to them the equal protection of the laws.

In the case of the *Central Pacific Railroad Company* vs. *State Board of Equalization*, reported in 60 Cal., page 35, the Supreme Court held that the provision of said Section 1, that no State shall deny to any person within its jurisdiction the equal protection of the laws, applied to natural persons and did not apply to corporations or artificial persons, and that question having been passed upon in the case of *Santa Clara County* vs. *The Southern Pacific Railroad Company*, in 118th United States Report, page 393, it is unnecessary in this proceeding for me to pass upon said question.

For the reasons above stated, the complaints in these actions cannot be sustained, and it is ordered that judgment be entered in favor of defendants, sustaining the demurrers in each of the above cases.

LEVY, Judge.

Provisions of the State Constitution, in Reference to the Assessment of Property.

SECTION 1 OF ARTICLE XIII.—"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership: *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be

exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State."

SECTION 4 OF ARTICLE XIII.—"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

SECTION 10 OF ARTICLE XIII.—"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities

and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Scheme for the Assessment and Levying of Taxes and the Collection of the Same Upon Railroad Property of Railroads Operated in More Than One County—Political Code of the State of California.

SECTION 3665. "The State Board of Equalization must meet at the State Capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the Board must assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way, are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August, the Board must apportion the total assessment of the franchise, roadway, road-bed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The Board must also, within said time, transmit by mail to the County Auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city

and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds or other description sufficient for identification, the assessed value per mile of the same as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling stock of said railway within the State, and the amount apportioned to the county, or city and county. The Auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation either of the county, city and county, or such township or district. On the first Monday in October the Board of Supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the State Board of Equalization within the county; the assessed value per mile of said railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which said railway runs, as fixed by the State Board of Equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors must transmit a copy of each order or equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such city, town, township, school, road, and lesser taxation districts respectively. If the

owner of a railway assessed by the State Board of Equalization is dissatisfied with the assessment made by the Board, such owner may, at the meeting of the Board, under the provision of Section three thousand six hundred and ninety-two of the Political Code, between the third Monday in August and the third Monday in September, apply to the Board to have the same corrected in any particular, and the Board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the Board shall increase or lower any assessment previously made by it, it must make a statement to the County Auditor of the county affected by the change in the assessment, of the change made, and the Auditor must note such change upon the assessment book or roll of the county as directed by the Board. [In effect March 9, 1883.]"

SECTION 3666. "The State Board of Equalization must prepare each year a book, to be called 'Record of Assessment of Railways,' in which must be entered each assessment made by the Board, either in writing, or by both writing and printing. Each assessment so entered must be signed by the Chairman and Clerk. The record of the apportionment of the assessments made by the Board to the counties, and cities and counties, must be made in a separate book, to be called 'Record of Apportionment of Railway Assessments.' In such last described book must be entered the names of the railways assessed by the Board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, road-bed, rails, and rolling stock for purposes of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county taxation. Before the third Monday of October of each year the Clerk of the State Board of Equalization must prepare and transmit to the Controller of the State

duplicates of the 'Record of Assessment of Railways' and 'Record of Apportionment of Railway Assessments,' each certified by the Chairman and Clerk of the Board, and to be known respectively as 'Duplicate Record of Assessment of Railways' and 'Duplicate Record of Apportionment of Railway Assessments.' In the last named duplicate two columns must be added, in one of which the Controller must enter the State taxes due the State upon the whole assessment by each corporation, person or association, and in the other the county, or city and county taxes, due upon the assessment apportioned to each county, or city and county, by each corporation, person or association. The two duplicates constitute the warrant for the Controller to collect the State and county, and city and county, taxes levied upon such property assessed by the Board, and the amount of the apportionment of the assessment to each county, and city and county, respectively. [In effect March 9, 1883.]"

SECTION 3667. When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways shall have fixed the rate of county, or city and county taxation, the Clerk of the Board of Supervisors must forthwith by mail, postage paid, transmit to the Controller a statement of the rate of taxation, levied by the Board of Supervisors, for county, or city and county taxation. If the Clerk fails to transmit such statement, the Controller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October the Controller must compute and enter in separate money columns in the 'Duplicate Record of Apportionment of Railway Assessments' the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor as the State tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the of the assessment to each county, the city and county, of the property assessed to such corporation, person, or association named in said duplicate record. [In effect March 9, 1883.]"

SECTION 3668. "Within ten days after the fourth Monday in October, the Controller must publish a notice for two weeks in one daily newspaper of general circulation at the State capitol, and in two daily newspapers of general circulation published in the city of San Francisco, specifying:

1. That he has received from the State Board of Equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate Record of Apportionment of Railway Assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock P. M., and that unless paid to the State Treasurer at the Capitol prior thereto, five per cent will be added to the amount thereof. On the last Monday in December of each year, at six o'clock P. M., all of unpaid taxes are delinquent, and thereafter there must be collected by the State Treasurer or other proper officer an addition of five per centum, which sum when collected must be set aside by the Treasurer, as a fund with which to pay the contingent expenses of actions against any delinquents, the said expenses to be audited by the Board of Examiners. When any taxes are paid to the State Treasurer by order of the Controller, upon assessments made and apportioned by the State Board of Equalization, the Controller must forthwith notify the Auditor and Treasurer respectively of each county, and city and county, that such taxes have been paid, and of the amount thereof to which each county, and city and county interested, is entitled. The State's portion of the taxes must be distributed by the Treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund, to be called "Railway Tax Fund," to the credit of each county, and city and county entitled thereto. When any taxes are placed in the "Railway Tax Fund" to the credit of a county, or city and county, the Controller, at the next settlement with the Controller by the Treasurer of such county, or city and county, must draw and deliver to such Treasurer, his warrant upon the State Treas-

urer for the amount in the fund to the credit of such county, or city and county. [In effect March 9, 1883.]"

SECTION 3669. "Each corporation, person, or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Controller, as other moneys are required to be paid into the Treasury, the State and county, and city and county taxes, each year, levied upon the property so assessed to it or him by said Board. Any corporation, person or association dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the Controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. At the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento. The Attorney-General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegaly collected, aed the cost of such action, audited by the Board of Examiners, must be paid out of any money in the General Fund of the Treasury, which is hereby appropriated; and the Controller may demand and receive from the county,

or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then, or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. [In effect March 9, 1883.]"

SECTION 3670. "After the first Monday of February of each year, the Controller must begin an action in the proper court, in the name of the people of the State of California, to collect the delinquent taxes upon the property assessed by the State Board of Equalization; such suit must be for the taxes due the State, and all the counties, and cities and counties, upon property assessed by the Board of Equalization, and appearing delinquent upon the 'Duplicate Record of Apportionment of Railway Assessments.'"

The demands for State and county, and city and county taxes, may be united in one action. In such action a complaint in the following form is sufficient:

[Title of Court.]

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

(NAMING THE DEFENDANT.)

Plaintiff avers that on the day of , in the year (naming the year) the State Board of Equalization assessed the franchise, roadway, road-bed, rails, and rolling stock of the defendant at the sum of (naming it) dollars. That the Board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on naming each county).

That the defendant is indebted to plaintiff for State and county taxes for the year eighteen , in the following sums: For State taxes, in the sum of (naming

it) dollars; for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent. added for non-payment of taxes.

Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as prescribed in section 540 of the Code of Civil Procedure.

(Signed by the Controller or his attorney.)

On the filing of such complaint, the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil actions; no bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought but before judgment, the defendant must pay as counsel fees such sums as the Court may determine to be reasonable and just. Payment of the taxes or the amount of the judgment in the case must be made to the State Treasurer. In such actions the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them, certified by the Controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State Board of Equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties therein named, and that the corporation, person, or association is indebted to the people of the State of California in the amount of taxes, State and county, and city and county, therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. [In effect March 9, 1883.]"

SEC. 3671. "The assessment made by the County Assessor, and that of the State Board of Equalization, as apportioned by the Boards of Supervisors to each city, town, township, school, road, or other district in their respective counties, or cities and

counties, shall be the only basis of taxation for the county, or any sub-division thereof, except incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect. All taxes upon townships, road, school, or other local districts shall be collected in the same manner as county taxes. [In effect March 9, 1883.]"

How Taxes are Collected upon all the Property in the State, except upon the Franchise, Roadway, Road-bed, Rails, and Rolling Stock of a Railroad Operated in more than one County.

"On or before the fourth Monday of October, the County Auditor must deliver a duplicate assessment book to the Tax Collector of the county." P. C., Sections 3732, 3733, and 3734.

"Within ten days after the receipt of the duplicate assessment book, the Tax Collector must publish a notice specifying:—

1. "That taxes will be delinquent on the last Monday in December next, thereafter, at six o'clock P. M., and that unless paid prior thereto, five per cent. will be added to the amount thereof.

2. "The time and place at which payment of taxes may be made." P. C., Sec. 3746.

"The notice in every case must be published for two weeks in some weekly or daily newspaper, published in the county, if there is one, or, if there is not, then by posting it in three public places in each township." P. C., Sec. 3749.

"On the last Monday in December of each year, at six o'clock P. M., all unpaid taxes are delinquent, and thereafter the Tax Collector must collect, for the use of the county, an addition of five per cent." P. C., Sec. 3756.

"On or before the first Monday in February, of each year, the Tax Collector in each of the counties other than San Fran-

cisco, and on or before the first Monday in March of each year, in the city and county of San Francisco, the Tax Collector of said city and county must publish the delinquent list, which must contain the names of the persons and a description of the property delinquent and the amount of taxes and costs due, opposite each name and description, with the taxes due on personal property added to taxes on real estate where the real estate is liable therefor, or the several taxes are due from the same person. The expense of the publication to be a charge against the county." P. C., 3764.

"The Tax Collector must append and publish, with the delinquent list, a notice that unless the taxes delinquent, together with the costs and percentage are paid, the real property upon which such taxes are a lien, will be sold at public auction." P. C., 3765.

"The publication must be made once a week for three successive weeks in some newspaper, or supplement thereto, published in the county, and the publication must be contracted for with the lowest bidder; and, after ten days, public notice that such will be let. The bidding must be by sealed proposals." * * * P. C., Sec. 3766.

"The publication must designate the time and place of sale." P. C., Sec. 3767.

"The time of sale must not be less than twenty-one, nor more than twenty-eight days from the first publication, and the place must be in front of the County Court House; or if in the city and county of San Francisco, or in front of the Tax Collector's office for all State and county taxes, and for all other taxes in front of the tax collector's office in their respective towns, cities, and local districts." P. C., Sec. 3768.

The Collector must collect, in addition to the taxes due on the delinquent list and five per cent. added thereto, fifty cents on each lot, piece, or tract of land separately assessed; and on each assessment of personal property, one half of which must go to the county and the other to the Collector in full for preparing the list." P. C., Sec. 3770.

"On the day fixed for the sale, or on some subsequent day to which he may have postponed it, of which he must give notice, the Collector, between the hours of ten o'clock A. M. and three P. M., must commence the sale of the property advertised, commencing at the head of the list and continuing alphabetically or in the numerical order of lots and blocks until completed." P. C., Sec. 3771.

"After receiving the amount of the taxes and costs, the Collector must make out in duplicate a certificate, dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed." P. C., Sec. 3776.

"The certificate must be signed by the Collector and one copy delivered to the purchaser, and the other filed in the office of the County Recorder." P. C., Sec. 3777.

"A redemption of the property sold may be made by the owner, or any party in interest, within twelve months from the date of the purchase." P. C., Sec. 3780.

The Lien and Effect of a Tax.

"Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid, or the property sold for the payment thereof." P. C., 3716.

"Every tax due upon personal property, is a lien upon the real property of the owner thereof, from and after twelve o'clock M., of the first Monday in March, in each year." P. C., 3717.

"Every tax due upon real property is a lien against the property assessed, and every tax due upon improvements upon

cisco, and on or before the first Monday in March of each year, in the city and county of San Francisco, the Tax Collector of said city and county must publish the delinquent list, which must contain the names of the persons and a description of the property delinquent and the amount of taxes and costs due, opposite each name and description, with the taxes due on personal property added to taxes on real estate where the real estate is liable therefor, or the several taxes are due from the same person. The expense of the publication to be a charge against the county." P. C., 3764.

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The Collector must collect, in addition to the taxes due on the delinquent list and five per cent. added thereto, fifty cents on each lot, piece, or tract of land separately assessed; and on each assessment of personal property, one half of which must go to the county and the other to the Collector in full for preparing the list." P. C., Sec. 3770.

"On the day fixed for the sale, or on some subsequent day to which he may have postponed it, of which he must give notice, the Collector, between the hours of ten o'clock A. M. and three P. M., must commence the sale of the property advertised, commencing at the head of the list and continuing alphabetically or in the numerical order of lots and blocks until completed." P. C., Sec. 3771.

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"Every tax due upon real property is a lien against the property assessed, and every tax due upon improvements upon

real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements, which several liens attach as of the first Monday of March, in each year." P. C., 3718.

When Suits may be Commenced to Recover the Delinquent Taxes upon all Property in the State, except upon Franchise, Roadway, Road-bed, Rails, and Rolling Stock of a Railroad Operated in more than one County.

P. C., 3899. "The Controller may, at any time after a delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list, amounting to three hundred dollars, further than to offer for sale but once any property upon which such tax is a lien. Upon such direction, the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the Controller a certified copy of the entries upon the delinquent list relative to such tax; and the Tax Collector, or the Controller, in case the Tax Collector refuses or neglects for fifteen days after being directed to bring suit for collection by the Controller, may proceed, by civil action in the proper Court, and in the name of the people of the State of California, to collect such tax and costs."

Special and Local Legislation Prohibited by the State Constitution.

SECTION 25 OF ARTICLE IV. "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

First—Regulating the jurisdiction and duties of Justices of the Peace, Police Judges, and of Constables.

Second—For the punishment of crimes and misdemeanors.

Third—Regulating the practice of Courts of Justice.

Fourth—Providing for changing the venue in civil or criminal actions.

Fifth—Granting divorces.

Sixth—Changing the names of persons or places.

Seventh—Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth—Summoning and impaneling grand and petit juries and providing for their compensation.

Ninth—Regulating county and township business or the election of county and township officers.

Tenth—For the assessment or collection of taxes.

Eleventh—Providing for conducting elections, or designating the places of voting, except on the organization of new counties.

Twelfth—Affecting the estates of deceased persons, minors, or other persons under legal disabilities.

Thirteenth—Extending the time for the collection of taxes.

Fourteenth—Giving effect to invalid deeds, wills, or other instruments.

Fifteenth—Refunding money paid into the State Treasury.

Sixteenth—Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State, or to any municipal corporation therein.

Seventeenth—Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.

Eighteenth—Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth—Exempting property from taxation.

Twenty-first—Changing county seats.

Twenty-second—Restoring to citizenship persons convicted of infamous crimes.

Twenty-third—Regulating the rate of interest on money.

Twenty-fourth—Authorizing the creation, extension, or impairing of liens.

Twenty-fifth—Chartering or licensing ferries, bridges, or roads.

Twenty-sixth—Remitting fines, penalties, or forfeitures.

Twenty-seventh—Providing for the management of common schools.

Twenty-eighth—Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts.

Twenty-ninth—Affecting the fees or salary of any officer.

Thirtieth—Changing the law of descent or succession.

Thirty-first—Authorizing the adoption or legitimation of children.

Thirty-second—For limitation of civil or criminal actions.

Thirty-third—In all other cases where a general law can be made applicable."

Corporations can only be Formed or Changed under General Laws.

SEC. 1 OF ART. XII OF THE STATE CONSTITUTION.—"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Special Privileges or Immunities not to be Granted.

SEC. 21 OF ART. I OF THE STATE CONSTITUTION.—"No special privileges or immunities shall ever be granted which may not be altered, revoked, or appealed by the Legislature, nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

Provisions of Constitution Mandatory or Prohibitory.

SEC. 22 OF ART. I OF THE STATE CONSTITUTION.—"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Points and Authorities.

Having given copies of the provisions of the Political Code, and of the State Constitution, to which we desire to call attention, we will now attempt to show that the whole scheme for the collection of taxes upon the franchise, road-bed, roadway, rails, and rolling stock of railroads operated in more than one

county, is in direct conflict with various provisions of the State Constitution and with the 14th Amendment to the Constitution of the United States.

I.

That sections 3668, 3669, and 3670 of the Political Code are in palpable contravention of Sub-division 10, of Section 25, of Article IV of the State Constitution in this, that they constitute a special law for the collection of taxes.

II.

That said Sections 3668, 3669, and 3670 of the Political Code are in palpable contravention of Sub-division 3, of Section 25, of Article IV of the State Constitution in this, that they constitute a special law regulating the practice of Courts of Justice in the collection of delinquent taxes upon the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county.

III.

That by the provisions of said Political Code immunities and privileges are conferred upon the owners of railroads operated in only one county, which are not conferred upon the owners of railroads operated in more than one county.

IV.

That burdens are, by said Sections of the Political Code, imposed upon the owners of railroads operated in more than one county which are not imposed upon the owners of railroads operated only in one county; and that such legislation is in direct conflict with Section 1, of Article XII, of the State Constitution.

V.

That the provisions of Sections 3668, 3669, and 3670 of the Political Code deprive the owners of railroads operated in more than one county of the equal protection of the laws; and hence are in conflict with the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI.

That the provisions of Sections 4 and 10, of Article XIII, of the State Constitution, and the legislation under said Sections for the assessment of the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county, deprive the owners of said railroads of the equal protection of the laws—hence, they are in direct conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It will be observed that all the above points, save the last one, relate exclusively to the *collection* of taxes; the latter only referring to the assessment of railroad property. So far as I am advised, these questions as to the collection of these taxes have never before been presented to or passed upon by any Court, except the Court below.

Is the Provision of the Code, before referred to, for the Collection of Taxes upon Railroad Property Operated in more than one County, a Special Law under the Constitution?

The taxes upon all the property in the State, except upon the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county, and that upon property belonging to natural persons and corporations, including railroad corporations operating and owning a railroad in only one county, are collected by the Tax Collector of the county in which the property is situated; and ten days after the fourth Monday of October, and after the receipt of the duplicate assessment book, said officer publishes in a newspaper published in the county, notice that the taxes will be delinquent on the last Monday in December at 6 o'clock P. M., and the time and place within the county at which payment of the taxes may be made. Should any taxes become delinquent it is then made the duty of the Tax Collector, after adding five per cent penalty, to make out the delinquent list, and on or before the first Monday in February to publish said delinquent list, which must contain the names of the persons and a description of the property delinquent, and the amount of taxes and costs due, opposite each name and description; and he must append and publish with said delinquent list a notice, that unless the taxes delinquent, together with the costs and percentage are paid, the property upon which such taxes are a lien will be sold at a time not less than twenty-

one, nor more than twenty-eight, days from the first publication, in front of the county court-house. That such notice must be published once a week for three successive weeks, in some newspaper or supplement published in the county. The owner of the property may at any time before sale pay the taxes due on the delinquent list, with the five per cent. penalty, together with fifty cents on each parcel of land separately assessed, and upon each assessment of personal property. Should the tax amount to three hundred dollars or more and remain unpaid, the State Controller may, in his discretion, direct the Tax Collector to offer the property for sale but once, and in case no bidders are found, then suit may be brought in the name of the State to collect such tax and costs. In case, however, no such order by the Controller is made and the property is sold, the owner then has twelve months within which to redeem the property. But, when we come to the collection of the tax upon the franchise, roadway, road-bed, rails and rolling stock of the few railroads operated in more than one county, we have the special and onerous conditions imposed by sections 3668, 3669 and 3670 of the Political Code; the Controller of State must publish a notice for two weeks *not in a newspaper published in a county in which any portion of the railroad may be situate*, but in one daily newspaper at the State capital, and in two daily newspapers published in the city of San Francisco; that he has received from the State Board of Equalization the "duplicate record of assessments of railways," and the "duplicate record of apportionment of railway assessments;" and that the taxes are now payable and will be delinquent on the last Monday in December at 6 o'clock P. M., and that unless PAID TO THE STATE TREASURER AT THE CAPITAL, prior thereto, five per cent. will be added to the amount thereof. Notwithstanding the notice, the corporation, person, or association assessed cannot pay over the taxes to the State Treasurer without an order from the Controller. If the taxes become delinquent no notice of the delinquency is published, and if they remain unpaid until after

the first Monday of February the Controller must then commence an action for the recovery of said taxes due to the State, and also any taxes that may be due the various counties, and cities and counties, and an attachment may issue without oath or bond, and any and all property belonging to the delinquent, and which is or not subject to any tax lien, is liable to be seized to satisfy said delinquent tax; and, in case the tax should be paid before judgment or after judgment, he is compelled to pay such counsel fees as the Court may allow; but should the property be sold under execution, he has only six months instead of twelve within which to redeem the same. In *ex-parte* Westerfield, 55 Cal., 550, this Honorable Court in banc held that an act to regulate and provide a day of rest in certain cases, which provided that it should be unlawful for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the labor of baking for the purposes of sale between the hours of 6 o'clock P. M. on Saturday and 6 o'clock P. M. on Sunday, was a special law within the meaning of those terms as employed in section 25, article IV, of the present constitution. It was further held, that if there was authority to restrain labor on some one day, it must be, if at all, under a general law restraining all labor on that day. A large class of persons were affected by this legislation, and the act applied to all persons of that class, while the legislation now in question affects but a few railroad corporations, but does not affect all railroad corporations—in other words, it does not affect any railroad operated in only one county. If the Baker's Act, so called, is a special law, then *a fortiori* is that portion of the Political Code a special law.

This Honorable Court in Banc, held in the case of Earle *vs.* The Board of Education of San Francisco, 55 Cal., 489, that a new section added to the Political Code which established the salaries to be paid to teachers in the public schools in all consolidated cities and counties containing more than one hundred thousand inhabitants, violated Section 25, Article IV, of the Constitution, and was null and void.

"A special act cannot be converted into a general act by a declaration of the Legislature, in another statute, that it shall be so considered." San Francisco *vs.* S. V. W. W., 48 Cal., 493.

In the case of the Dundee Mortgage Trust Investment Company *vs.* School District No. 1, of Multnomah County *et al.*, in the Circuit Court of Oregon, reported in Second West Coast Reporter, p. 241, upon an application for a provisional injunction to restrain defendants from selling and disposing of sundry notes and mortgages belonging to the plaintiff for the non-payment of taxes levied thereon, under the provision of an act of the Legislature of the State of Oregon, Deady, Judge, ordered that the writ be issued as prayed for. The act in question provided for the taxation of mortgages upon real property situate in no more than one county, and declared that all mortgages "hereafter executed whereby land situate in more than one county in this State is made security for the payment of a debt, shall be void."

In rendering the opinion, the Court said (see pages 250, 251): "The Constitution of the State, Article 4, Section 23, sub-division 10, also prohibits the passage of 'special or local laws' for the assessment and collection of taxes for State, county, township, or road purposes."

"In *Manning* vs. *Klippel*, 9 Or., 367, it was held that an act providing for the compensation of the sheriffs and clerks of fourteen out of the twenty-three counties of the State was a 'local' law for the assessment and collection of taxes for county purposes, and therefore within this prohibition and void.

"The terms 'special' and 'local' are not always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the genus, while the former is confined to the species. In Holland's case, 4 Co. 76 a, cited in Smith's Commentaries, Section 798, it is said, by way of illustration: 'Spirituality is *genus*; bishopric, deanery, etc., are *species*;' and the author adds: 'Hence acts which concern the whole spirituality in

general, are general acts. * * * A statute concerning leases made by bishops is a special act, because it concerns the bishops only, who are but a species of spirituality.'

"An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the genus. But an act providing for the assessment of all mortgages for sums exceeding five hundred dollars, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on wood-lands, plow-lands, or river-lands, is special; and in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the genus, mortgages, but only the species—one county mortgages. Without imputing to the legislature that passed this act any other purpose, in making this discrimination between one and two county mortgages, than a desire to avoid the supposed inconvenience of applying it to the latter, it is well to remember that special legislation in the imposition of taxes is sure, if unrestrained, to run into partiality, oppression and injustice. To prevent this evil, this inhibition against special legislation was placed in the constitution."

Subsequently this case was heard upon demurrer. The opinion of the Court was reported in 3d West Coast Rep., p. 606. Among other things the Court said: "On March 6, 1884, the injunction was allowed upon the ground that the act aforesaid, under which the plaintiff's mortgages were assessed, was void for want of the uniformity required by Section one of Article IX of the Constitution, and because it was passed contrary to Section 23 of Article IV of the Constitution, which forbids the passage of a special act for the assessment and collection of taxes." Again, on page 612, the Court said: "But passing the question of uniformity, this act is clearly void, because it was passed in violation of Section 23 of Article IV of the Constitution, which expressly forbids the

passage of a 'special or local' law 'for the assessment and collection of taxes.' It is not necessary to add to what was said on this subject in the former opinion, as the brief only refers to *Allen* vs. *Hirsh*, 8 Or., 412, which I regard as overruled by *Manning* vs. *Klippel*, 9 Or., 367, so far as to decide that a public statute cannot be a 'special or local' one within the meaning of Section 23 of Article IV of the Constitution of the State.

"A 'special' act relates to a part and not the whole—as one county mortgages and not all mortgages. And whether it is also considered a 'public' or 'private' one, is altogether immaterial and irrelevant. Under the constitution of this State all statutes are 'public' ones, unless otherwise declared in the body of the act." Art. IX, Sec. 37, Or. Con.

"If an act is not a 'special' one because it is also a 'public' one—that is, an act of which Courts take judicial notice,—then every prohibition contained in the constitution against special legislation may be violatied with impunity.

"According to this idea, if the law is 'public' it is not special. But the constitution makes it public, however special in its nature or operation, unless the legislature otherwise declares. So, as there can be no special law, according to this theory, unless the legislature declares it is private, it is not likely that when it undertakes to pass an act upon subjects forbidden to special legislation, it will take the trouble to declare it private, and thus subject it to the risk of being declared unconstitutional."

"But, undoubtedly, under the constitution of the State, an act may be both 'public' and 'special or local' and the presence of one of these qualities in no way implies or excludes the other. An act cannot be both 'public' and 'private' but it can be either and be special.

II.

Section 3670 of the Political Code is Void, because the same is a Special Law Regulating the Practice of Courts of Justice in Actions brought to recover Delinquent Taxes upon the Franchise, Roadway, Road-bed, Rails, and Rolling Stock of Railroads Operated in more than one County.

The Code of Civil Procedure furnishes a complete system of Practice in all civil actions. Section 421, C. C. P., declares that,—"*The forms of pleading in civil actions and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.*"

Section 426 C. C. P., declares what is a sufficient complaint as follows: "The complaint must contain—

First.—The title of the action, the name of the Court and county in which the action is brought, and the names of the parties to the action.

Second.—A statement of the facts constituting the cause of action, in ordinary and concise language.

Third.—A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded the amount thereof must be stated."

When Causes of Action may be United.

SECTION 427, C. C. P. "The plaintiff may unite several causes of action in the same complaint, where they all arise out of—

1st. Contracts, express or implied.

2d. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3d. Claims to recover specific personal property, with or without damages for the withholding thereof.

4th. Claims against a trustee by virtue of a contract or by operation of law.

5th. Injuries to character.

6th. Injuries to person.

7th. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

When and How a Defendent may Demur.

SECTION 430, C. C. P. "The defendant may demur to the complaint within the time required in the summons to answer when it appears upon the face thereof, either —

1st. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2d. That the plaintiff has no legal capacity to sue; or,

3d. That there is another action pending between the same parties for the same cause; or,

4th. That there is a defect or misjoinder of parties, plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. That the complaint does not state facts sufficient to constitute a cause of action; or,

7th. That the complaint is ambiguous, unintelligible, or uncertain."

SECTION 433, C. C. P. "When any of the matters enumerated in Section 430 do not appear upon the face of the complaint, the objection may be taken by answer."

SECTION 434, C. C. P. "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Objections to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action and on the ground that the Court has not jurisdiction, may be made at any time. These objections may be made for the first time in the Supreme Court. *Haskell* vs. *Moore et al.*, 29 Cal. Rep., 437. *Rogers* vs. *Shannon*, 52 Cal., 99.

Instead of allowing the Court to determine the sufficiency of the complaint under the forms and rules prescribed by the Code of Civil Procedure, the legislature usurping the powers and prerogatives of the Court, in Section 3670 of the Political Code, therein and thereby adjudged, that the form used in these actions is sufficient. Said Section 3670 P. C. makes a complaint sufficient that would be wholly insufficient under Section 426, C. C. P., in this—that no statement of the facts constituting the cause of action is made or attempted, but simply two preliminary facts, to wit: An assessment against the defendant by the State Board of Equalization, and an apportionment of said assessment. There is no statement that the defendant is the owner of the franchise, roadway, road-bed, rails, and rolling stock of any railroad operated in more than one county, or in any of the counties to which such apportionment was made; neither is there any averment that any State tax was levied upon said property; nor is there any averment that either of said counties named levied any county tax upon said property; neither is there any averment that the State Board of Equalization ever determined the rate of the State tax to be levied and collected upon said property; neither is there any averment that the Board of Supervisors of any of said counties, fixed the rate of the county tax to be levied and collected upon said property. In a word, the form of complaint given in said

section would be held insufficient under any known system of pleadings, on the ground that it does not state facts sufficient to constitute a cause of action. Said complaint is a palpable violation of Section 427, C. C. P., in this—that eighteen different causes of action, to wit: One for State taxes, and seventeen for that number of county taxes, are united in one action in a single count, without being separately stated. Tested by the Code, these complaints would fall of their own weght; and, had it not been for the form prescribed in Section 3670, P. C., counsel would never have dreamed of filing such a complaint.

The case of *Whiting* vs. *Townsend*, 57 Cal., 515, is not an authority in this case, for the reason that the law prescribing the form of complaint in action to recover certain street assessments was passed in 1872, and the cause of action arose and suit had been commenced prior to the adoption of the present constitution.

Neither is the case of the *City of Stockton* vs. *The Western Fire and Marine Insurance Co. et al.*, 73 Cal., 621, an authority in this case—that was an action instituted by the city to recover certain delinquent taxes. The form of the complaint was one permitted by a section of the charter of said city which was passed prior to the adoption of the present constitution, to wit, 1872, which charter has remained in force up to the present time, not having been altered or amended, and there having been no reorganization of the municipal corporation under the present constitution. For the same reasons the cases of Richardson *vs.* Tobin, 45 Cal., 34, and Sullivan *vs.* Mier, 67 Cal., 265, are not authority upon this question.

The sections of the code under discussion were passed under the new Constitution, and went into effect March 9, 1883.

A question similar to that now in discussion arose in the case of the *Madison and Indianapolis R. R. Co.* vs. *Whitteneck*, reported in 8th Ind. Reports, p. 217. The legislature of Indiana passed an act entitled, "An act to provide compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of any railroad company in this State. Approved March 1, 1853.

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, that whenever any animal or animals shall be killed or injured by the cars, or locomotives, or other carriages used on any railroad in this State, the owner thereof may go before some justice of the peace of the county in which such injury occurred and file his complaint in writing, and such justice shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company defendant, by service of summons by copy on any conductor of any train passing through said county.

"SECTION 2. On the hearing of said cause, the justice or jury trying the same shall give judgment for the plaintiff for the value of the animal destroyed or injury inflicted, without regard to the question whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident.

"SECTION 3. If the defendant shall appeal from such judgment, and shall not reduce the damages assessed twenty per cent, the Appellate Court shall give judgment for double the amount of damages assessed in such Appellate Court, and a docket fee of five dollars.

"SECTION 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such company."

Suit was commenced under this law before a justice of the peace, to recover the value of a heifer killed by a locomotive of defendant. Plaintiff obtained judgment before the justice, whereupon the defendant appealed to the Common Pleas; in that Court, the defendant not appearing, judgment was rendered for plaintiff, without the intervention of a jury, for double the amount of the judgment before the justice. After discussing the case at considerable length, the Court said:

"4. The third section, so far as it inflicts a penalty for appealing and failing to reduce the judgment twenty per cent, is, in our opinion, unconstitutional and void.

"A law may be constitutional in part and unconstitutional

in part. *This third section relates to the practice of the law in these cases.* The trial and rendition of judgment are a part of the practice in a cause. *The section is special.* Laws are general or special. This is the first great division. Special laws are again divided into local, personal, particular, etc. See Smith's Com., p. 419. A special act concerns 'the particular interest or benefit of certain individuals, or of particular classes of men. See 1 Kent, 459. A law may be 'partly public and partly private.' The principle of this act is entirely different from the principle of those general laws fixing the jurisdiction of the several courts. The jurisdiction of the court of the justice of the peace is limited by them in respect to amount. But within that limit it operates alike upon all. So as to that of the Common Pleas and of the Supreme Court. There may, however, be unconstitutional sections in those acts. As to this we are not now called upon to speak.

"The section, then, under consideration being special, and upon the practice of the law, is prohibited by that clause of Section 22, Article IV, of the Constitution which provides that no such act shall be passed, 'regulating the practice in courts of justice.'

"5. The first section of the act is also void so far as it gives, as to amount, unlimited jurisdiction to justices of the peace. In that particular it is special, and in conflict with that clause of the section of the Constitution just cited which prohibits special laws 'regulating the jurisdiction and duties of justices of the peace and constables.'"

Section 3670 of the Political Code contains several other equally obnoxious special provisions, to wit:

1. The issuing of an attachment without affidavit or bonds.

2. The recovery of counsel fees in such an amount as the Court may determine to be reasonable and just.

The Code of Civil Procedure, Section 538, before an attachment can issue, requires an affidavit to be made by or on behalf of plaintiff, showing:

"1. That the defendant is indebted to the plaintiff (specify-

ing the amount of such indebtedness over and above all legal setoffs or counter claims) upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff or to the person to whom the security was given, become valueless." * * * Said Section 3670 of the Political Code not only provides for an attachment without any affidavit or bond, but in an action that is not upon a contract, either express or implied, for the direct payment of money; and also requires such attachment where the taxes are a lien upon the property assessed.

Section 539, C. C. P., provides, that before issuing the writ of attachment, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. If under the provisions of this mandatory and prohibitory constitution, with a Code of Civil Procedure in terms applicable to all civil actions, which expressly declares that all pleadings shall be judged by the rules and regulations of said code, and which requires that the complaint shall contain a statement of facts constituting a cause of action, and that, where several causes of action are united, they must affect all the parties to the action and must be separately stated; and which declares that an attachment can only be issued upon affidavit, which must show that the defendant is indebted upon a contract, express or implied, for the direct payment of money—if this Honorable Court shall determine in these actions that the legislature and not the Court may pass upon the sufficiency of the pleadings, and that all the rules

and regulations of the code as to the sufficiency of such pleadings can be set aside in certain cases, and that an attachment may issue in such cases where the same could not be issued under the provisions of the general law of procedure, and that counsel fees may be awarded in such actions which are not allowed in any other action—we respectfully reiterate, that if these actions can be sustained under the provisions of the constitution prohibiting special legislation, then is Section 25 of Article IV of the State Constitution but a worthless prohibition, as the legislature may from time to time emasculate and destroy, by a series of special acts, the entire system of the Code of Civil Procedure and the revenue laws of the State.

Special legislation in this State, prior to the adoption of the Constitution of 1879, had become a great and crying evil. We had no such thing as a revenue law, civil practice act, or criminal practice act, applicable to the whole State. Grand juries in different portions of the State consisted of different numbers, as low as fifteen; in other places eighteen, and in yet others twenty-three constituted a grand jury. In San Francisco, in civil cases, the prevailing party in civil actions was allowed five per cent. upon the amount recovered in any civil action to the extent of $100, which was not allowed in any other portion of the State.

Most of the time of the legislature was occupied in the passage of local and special bills. These measures were far more costly than the cost of general laws. Indeed, there was scarcely such a thing as a general law. The statutes were swelled to enormous proportions, containing as high as 1,100 pages per volume. There was a general feeling of insecurity among the people, and it was determined that at least the practice of the courts in both civil and criminal actions, and the collection of revenue throughout the State should be uniform; that if there were any laws of a general nature, these, and others not necessary to name, should operate with uniformity throughout the length and breadth of the State.

The Supreme Courts of other States have frequently construed a similar constitutional provision concerning special legislation; and we especially call the attention of the Court to the following cases:

Com. vs. *Patton*, 88 Pa. St. R., 258.
Scowden's Appeal, 96 Pa. St., 422.
Appeal of School Dist., 113 Pa. St., 176.
City of Scranton vs. *Silkman*, 113 P. St., 191.
Davis vs. *Clark*, 106 Pa. St., 377.
Frost vs. *Cherry*, 15 Atlantic R., p. 782.
Clark vs. *City of Cape May*, 14 Atlantic R., 581.
State vs. *Township Committee of Northampton*, 14 Atlantic R., 588.
City of Topeka vs. *Gillett*, 4th Pacific Reporter, p. 800.
State vs. *Parsons*, 40 N. J. Law R., 1.
Tiger vs. *Morris County*, 42 N. J. Law R., p. 631.
State vs. *Hammer*, 42 N. J. Law R., p. 435.
City of Council Grove, 20 Kansas R., 619.
State vs. *Cincinnati*, 20th Ohio Stat., 18.
State vs. *Lawrence Bridge Co.*, 22 Kansas, p. 438.
Harris vs. *Hermann*, 75 Mo. R., p. 340.
State vs. *Mitchell*, 31st Ohio St., 592.
Devine vs. *Cook County*, 84 Ill., 590.
City of Redding vs. *Savage*, 13 Atlantic R., p. 919.
People vs. *Cooper*, 83d Ill. R., 585.
State vs. *Philbrick*, 15 Atlantic R., p. 579.
Atlantic City Water Works vs. *Consumers' Water Co.*, 15th Atlantic R., p. 581.
Appeal of Ayers, *Weekly Notes of Cases*, p. 97.
Berghous vs. *City of Harrisburg*, *id.* 106.
Klugh vs. *Harrisburg*, *id.* 107.

See also—

Desmond vs. *Dunn*, 55 Cal., 242.
McDonald vs. *Patterson*, 55 Cal., 245.
Miller vs. *Rister*, 68 Cal., 142.

III.

The Political Code grants Privileges and Immunities to the Owners of the Franchise, Roadway, Road-bed, Rails and Rolling Stock of Railroads operated in one County, and to other Taxpayers, which are Not Granted to the Owners of the Franchise, Roadway, Road-bed, Rails and Rolling Stock of Railroads operated in more than one County, and is therefore Obnoxious to the Provisions of Section 21 of Article I of the State Constitution.

The State Constitution is in no manner responsible for the inequalities of the Political Code in reference to the collection of taxes. That instrument simply provided for the assessment of the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county, and the apportionment of such assessment to the various counties in which the road was operated. There is not the slightest word or phrase to indicate that it was the intention of the framers of the Constitution that the tax should be collected by officers other than the tax collectors of the various counties; on the contrary, from the language of the Constitution, it would seem that the taxes levied upon the property so assessed should be collected in the same manner and by the same officers as the other taxes of the State. We have already had occasion to refer to the burdens imposed upon the owners of railroads operated in more than one county, and we shall have occasion to refer to them again when discussing the 14th amendment to the Constitution of the United States; and yet, in order to make our present point clear, it is necessary to refer to them in this connection, but in a very brief manner.

Whenever the tax upon any property, other than railroad property operated in more than one county, becomes delinquent, the owner is notified of such delinquency and its amount, as well as the amount of costs which have attached, by a notice published in a newspaper published in the county in which the property is situate; and he may pay the tax in that county;

and the property must first be offered for sale before any suit can be brought to recover the tax. At any time before sale he may satisfy the lien by paying the tax, five per cent. penalty and fifty cents for each lot or piece of property advertised as delinquent. If the Controller so directs, the property may be offered but once for sale, and if no bidders be found, suit may be commenced; but, if the property is sold, he has twelve months within which to redeem the same, and one month after written notice to him that an application will be made for a deed on a given day. The owners of railroads operated in more than one county are deprived of all these privileges and immunities. They cannot pay the taxes to the tax collector of the county, but must go to the trouble and expense of going to the State Capitol; and, as the tax is payable in gold or silver coin, they must bear the risk of its transportation to the Capitol, and after getting an order from the Controller, pay over the tax to the State Treasurer. Should the tax become delinquent on their property, they are in no manner notified of such delinquency, except by the service of a copy complaint and summons, in an action brought to recover said tax, and the appearance of the sheriff with a writ of attachment to attach any and all of their property for said tax. If they desire to settle the suit before judgment, they must pay such counsel fees as the Court may allow; and, if judgment be entered against them, such counsel fees as may be allowed by the Court form a part of said judgment, and if their property be sold under an execution they have but six months within which to redeem.

The Board of Supervisors of the county of Lassen attempted to collect a tax, under the guise of a license, of 2½ cents per head for each sheep pastured in said county, where the State and county taxes on said sheep were paid in another county. One of the provisions of the ordinance was, that the tax was not to be paid by those who listed their sheep as taxable property in that county, and paid taxes on them as such. In the case of *Lassen County* v. *Cone*, decided May 31, 1887, it

was held by the Commissioners, and by Department one of said Court, that the ordinance was unconstitutional and void in this, that it was violative of Section 21 of Article I of the State Constitution.

IV.

Sections 3668, 3669, and 3670 of the Political Code Impose Burdens upon the Owners of Railroads Operated in more than one County which are not Imposed upon the Owners of Railroads operated in only one County; and that such Legislation is in direct Conflict with Section 1 of Article XII of the State Constitution.

All the State taxes collected in the State, except those upon the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county, are by law taken by the treasurers of the respective counties to the State Capital, and there paid into the State Treasury. The County Treasurer is allowed certain commissions upon the moneys transferred, and is allowed forty cents per mile from the county seat to the Capital, as mileage—such mileage not to exceed, at any settlement, one hundred dollars. Said sections of the code seek to compel the owners of railroads operated in more than one county to transport to the State Capital, not only the State tax, but the county taxes, at their own cost and risk, and without any allowance for commissions or mileage, while the owners of railroads operated in only one county may pay over their taxes in the county in which their roads are situate, without any costs or risks whatsoever.

What right has the State to impose upon the owners of railroads operated in more than one county the cost and risk of transportation? Should the moneys be lost in transit, by inevitable accident, by the act of God or by train robbers, it would be no excuse for not paying the taxes over to the State Treasurer; the tax would still be due, although the money intended to pay the same had been thus lost. The aggregate of the

taxes claimed on these five actions amounts to about $650,000. As these taxes must be paid in gold or silver coin, the cost of transportation would amount to no small sum; were the amount paid in gold coin alone, its weight would exceed a ton and a half; were it paid in silver alone, its weight would amount to over twenty tons; were it paid, one-half in gold and one-half in silver, its weight would amount to about eleven tons. It would be necessary to hire teams and armed guards to transport it from the railroad offices or banks to the cars. In these days of train wrecking for plunder and train robberies, it would be necessary to have an armed guard upon the train to protect it from depredations.

Upon arriving at Sacramento, it would be necessary to hire other teams to haul the treasure from the railroad to the office of the State Treasurer. Again we inquire, what right has the State to impose these onerous and expensive duties upon the owners of railroads operated in more than one county when they are not imposed upon the owners of railroads operated in only one county? What right has the State to commence suit by attachment, without advertising the property as delinquent, and offering it for sale? What right has the State to impose upon the owners of railroads operated in more than one county counsel fees for bringing the action, and reduce the time for redemption (should the property be sold) from one year to six months, when none of these things can be done or imposed upon the owners of railroads operated in only one county.

In accordance with the Constitution, all railroad corporations in this State are formed under the same general law; and any attempt to confer a benefit or impose a duty upon one or more railroad corporations which is not conferred or imposed upon all railroad corporations, is null and void, being in conflict with Section 1 of Article XII of the State Constitution. The legislature has attempted in some cases to confer benefits upon certain corporations; in other cases it has attempted to impose obligations upon certain corporations, which were not conferred or imposed upon all corporations of the same class;

and this Honorable Court, with a single exception, has steadily upheld the doctrine here contended for, and the exceptional case has been steadily overruled, and such cogent reasons given therefor, that no man at the bar would now dare attempt to support the ruling in the case of the *State Telegraph Company* vs. *Alta Telegraph Company*.

In the case of *San Francisco* vs. *S. V. W. W.*, reported in 48 Cal., p. 493, Mr. Justice Crockett then said: "After a careful examination of that case, I am satisfied it cannot be sustained either on reason or authority." Mr. Justice Crockett further said, in speaking of corporations: "They can only be formed under general laws, and can exercise no powers, except such as are derived from general laws. * * * The general laws under which they were formed, and such others as shall afterwards be enacted, must alone define their rights and powers. *On this theory all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights, and be subject to the same burdens, which cannot be increased or diminished, except by general laws applicable to all.*"

Mr. Justice McKinstry in the same case said: "The legislature could neither confer a benefit nor impose an obligation on the Spring Valley Water Works not conferred or imposed on all water companies by the general law. To confer a special benefit or impose a special obligation would be equally destructive of the uniformity which it is the object of Section 31, Article IV, to secure." Again he said: "*The rights and duties of all corporations formed under the general law providing for the incorporation of water companies are fixed and determined by its terms, and can only be changed or modified by amendment of the general law. And every such amendment must be made applicable to all corporations created under the general law.*"

The same doctrine was adhered to and laid down in the case of the *Waterloo Turnpike Road Company* vs. *Cole*, 51 Cal., 381; and in the case of the *Spring Valley Water Company* vs.

Bryant, 52 Cal., 132. In the case of the *Omnibus Railroad Company* vs. *Baldwin*, 57 Cal., 160, Mr. Justice McKinstry, in a concurring opinion, said:

"Section 31 of Article IV of the former constitution of the State reads: 'Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.' This section has been judicially construed by the Supreme Court of the State in *The City and County of San Francisco* vs. *The Spring Valley Water Works*, 48 Cal., 493, and *Waterloo Turnpike Company* vs. *Cole*, 51 *Id.*, 381. By reason of the section of the constitution above recited, the legislature of California has no power by special act to confer upon a corporation formed or to be formed under the general laws corporate powers not acquired by all like corporations under the general laws. I do not propose to fortify the reasoning of Mr. Justice Crockett, in *San Francisco* vs. *Spring Valley Water Works*. In itself eminently satisfactory, it accords with established canons of constitutional and statutory construction. My purpose is simply to show that, to the extent above intimated, the construction of the provisions of the Constitution has been 'settled' by the highest tribunal of the State."

The same Justice said: "Corporations may be formed *only* under the general laws, but they are not formed nor created directly *by* the general laws. They are formed by individuals under the general law; and when, in a particular instance, the corporate character is assumed, it is assumed with the same powers, privileges, and liabilities as are possessed by and imposed upon all other like corporations formed by other individuals under the same general law. Corporations formed under the general laws do not exist anterior to the acquisition of the power to hold property or any other corporate power. They come into existence panoplied. There can be no instance of the formation of a corporation under a general law which differs as to its corporate powers, or its liberty to employ them,

from other corporations formed under the same general law; and there can be no creation, by special act, of a corporation which might or might not have been formed under the general laws."

The construction of this clause of the Constitution having been judicially settled by the cases just cited, respondents refrain from citing similar authorities from other States, believing it would be a work of supererogation.

V.

The provisions of Sections 3668, 3669 and 3670 of the Political Code Deprives the Owners of Railroads Operated in more than one County of the Equal Protection of the Laws, and hence are in Conflict with the Provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Will it be claimed or pretended that the owners of railroads operated in more than one county enjoy the equal protection of the laws? Does not the State deny them that protection in a most marked and oppressive manner? Not because they operate railroads, but because they operate them in more than one county. As well might the State compel all men six feet in height, or all persons, natural or artificial, who own property in more than one county, to pay their taxes to the Treasurer at the State Capital, while all other persons, natural and artificial, may pay theirs in the county in which the property is situated; as well the State refrain from publishing the delinquent list with the amount of such delinquency for such persons, and authorize a suit by attachment directed against their property without first offering their property for sale, and compelling them to pay counsel fees for the commencement and conduct of such suits, and limiting the time for the redemption of their property, in case of sale under such judgment, to one-half the time allowed to all other tax-payers. The owners of railroads operated in more than one county enjoy the equal protection of the laws,

with a vengeance. They are subjected to the onerous provisions of Sections 3668, 3669 and 3670 of the Political Code, not because they are corporations owning and operating property and doing business in more than one county, for there are any number of corporations, such as water companies, turnpike companies, mining companies, express companies, telegraph companies, telephone companies, and other companies, which own property in various counties in the State, and carry on and operate their business in said counties; and yet, none of these onerous duties are imposed upon them, or any of them. It is not because the owners of railroads operated in more than one county are railroad corporations, because there are about the same number of railroad corporations which are operated in only one county, upon which none of these duties have been imposed.

VI.

The provisions of Sections 4 and 10 of Article XIII of the State Constitution, and the Legislation under said Sections for the Assessment of the Franchise, Roadway, Road-bed, Rails and Rolling Stock of Railroads operated in more than one County, deprive the Owners of said Railroads of the Equal Protection of the law—hence, they are in Direct Conflict with Section 1 of the 14th Amendment to the Constitution of the United States.

This Court has not hitherto been called on to pass upon, and has not passed upon, the State Constitutional questions which arise in this case.

In the case of the *People* vs. *The Supervisors of Sacramento County*, 59 Cal., 321, this Court held that, under the provisions of the Constitution, County Boards of Equalization could not equalize valuations of railroad property assessed by the State Board of Equalization.

In the case of the *San Francisco and North Pacific Railroad Company* vs. *The State Board of Equalization*, 60 Cal., 12, it was held, as in the Sacramento case, that Section 10 of

Article XIII of the Constitution was self-executing, and that the franchise, roadway, road-bed, rails and rolling stock of railroads operated in more than one county must be assessed by the State Board of Equalization; and that because such property was required to be assessed by one set of officers and all other property in the State was to be assessed by local officers within the respective counties, it was not in conflict with the provisions of the Federal Constitution, and not in conflict with sub-division 10 of Section 25, of Article IV of the State Constitution.

In the case of the *Central Pacific Railroad Company* vs. *The State Board of Equalization*, 60 Cal., 35, this Court held that the provision of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the law, applied only to natural persons, and not to corporations or to artificial persons; that the franchise of a railroad company was assessable. The Supreme Court of the United States, in the case of the *County of Santa Clara* vs. *The Southern Pacific Railroad Company*, 118 U. S., 396, held that the Fourteenth Amendment does apply to corporations.

In the cases of the *State of California* vs. *The Central Pacific Railroad Company et al.*, 127 U. S., 1, it was held that franchises conferred upon railroad companies by Congress cannot be taxed by a State without the permission of Congress; and this Honorable Court, in the case of *San Benito County* vs. *Southern Railroad Company*, 19 Pacific Rep., 827, followed the rule laid down by the Supreme Court of the United States in the case last cited.

Section 1 of article XIII of the Constitution of California provides, in substance, that all property in the State shall be taxed in proportion to its value, and in defining the word *property*, as used in the section, declares that it includes moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. If this section stood alone, it would be clear that the

full value of a tract of land must be assessed against its owner, notwithstanding the fact that it was mortgaged for its full value to secure an indebtedness due from the owner to the holder of the mortgage; and it is clear, also, that under this section, standing alone, the credits secured by the mortgage must also be taxed at their value to the owner of the mortgage. This is double taxation. The decisons of this Court, rendered after the discussion had gone on for many years, and after full and elaborate arguments, settle that point.

Savings and Loan Socie y vs. *Austin*, 46 Cal., p. 415.
Burke vs. *Badlam*, 57 Cal., 600.

The decision in the case of the *S. & L. Soc.* vs. *Austin* antedates the formation of the new Constitution.

The debates in the Constitutional Convention show clearly that the members of that body were thoroughly conversant with the effect of that decision, and that to avoid double taxation, as to all other persons except railroad and other *quasi* public corporations, it inserted the provisions which are found in Section 4 of Article XIII of the new Constitution, which provide that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby; that they should be so deemed and treated, except as to railroads and other *quasi* public corporations, and that, except as to such corporations the debt so secured should be deducted from the value of the property upon which the security rests. No clearer case of intentional discrimination could be made. That it was the intent and purpose of the framers of that Constitution to impose double taxation, not only upon the railroad property, but upon all other property, real and personal, owned by such corporations, is established beyond even the possibility of a doubt. This Court concedes, in the case of the *Central Pacific R. R. Co.* vs. *The State Board of Equalization*, 60 Cal., p. 35, that there is no practical difference between a system which taxes the property of

railroad corporations at a higher rate of percentage upon the value than is imposed upon other property and a system which establishes a mode of estimating the value of such property which results in imposing a burden upon such property greater than is imposed upon other property.

In *Miller* vs. *Heilbron*, 58 Cal., 133, in construing the Act of Congress conferring upon the States power to tax National Banks, and limiting the power conferred by a provision "that taxation must not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of that State," this Court adopted the construction of the Supreme Court of the United States in the case of *The People* vs. *Weaver*, 100 U. S., 543, namely, that the phrase the "taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., means something more than that there should be no discrimination with respect to percentage, on any valuation which might be made; that it means in taking the assessment, rate of assessment and valuation together, the taxation on shares of National Banks should not be greater than on other moneyed capital.

In the case of *Miller* vs. *Heilbron*, the facts were, that the Assessor, in making the assessment against the plaintiff's shares of stock in a National Bank, was obliged to pursue the method prescribed in Sec. 3640 of the Political Code, and could not, under that section, deduct from the valuation of such shares debts due from the plaintiff to citizens of the State.

The Court held that the section under which the Assessor acted constituted clearly a discrimination against the owner of National Bank shares, and in favor of the owner of credits, and that the former was assessed at a greater rate than the latter. Referring to the Act of Congress which permitted the State to assess shares of stock in National Banks, under certain restrictions, it held that the restrictions operated upon the State Legislature, and that the fact whether, in a particular instance, the owner of National Bank shares owes any debts is immaterial, for, say the Court, "By the laws of this State, he is not permitted to deduct them, if he does."

Section 3640 of the Political Code, under which the assessment in question was made, violated the rule of equality and uniformity prescribed by the Act of Congress, for which reason the Court held that it neither had nor could have any force or effect against any one.

When we apply the principles of that decision to the case in hand, and read Section 4 of Article XIII in their light, we must arrive at the conclusion that Section 4, in effect, declares that all property belonging to railroad and other *quasi* public corporations shall be assessed at a greater rate than other property of the same kind is taxed. The Court need not consider the question whether this makes an unjust and illegal discrimination against such corporations, for that matter has already been authoritatively determined by this Court.

As before stated, the Supreme Court of the United States has held (*Santa Clara* vs. *S. P. R. R.*, *supra*), that the Fourteenth Amendment to the Constitution of the United States limits the power of taxation to the imposition of burdens upon some rule of equality and uniformity, and it follows that any law, whether it be in the form of a statute, or in the shape of a constitutional enactment, which violates the rule of equality and uniformity must fall.

In support of *Miller* vs. *Heilbron*—if support it needs—I cite the well-reasoned case of the *National Albany Exchange Bank* vs. *Wells*, 18 Blatchford's Circuit Court Repts., 478.

Mr. Justice Field, in delivering the opinion of the Court in the case of the *County of San Mateo* vs. *The Southern Pacific Railroad Company*, 8 Sawyer, p. 254, says:

"If we now look at the scheme of taxation prescribed by the Constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government. Whenever an individual holds property encumbered with a mortgage, he is assessed at its value, after deducting from it the amount of the mortgage. If a railroad company holds property subject to a mortgage, it is

assessed at its full value, without any deduction for the mortgage; that is, as though the property were unencumbered. The inequality and discriminating character of the procedure will be apparent by an illustration given by counsel: Suppose a private person owns a farm, which is valued at $100,000 and is encumbered with a mortgage amounting to $80,000; he is, in that case, assessed at $20,000; if the rate of taxation be two per cent., he would pay $400 taxes. If a railroad corporation owns an adjoining tract worth $100,000, which is also encumbered by a mortgage for $80,000, it would be assessed for $100,000, and be required to pay $2,000 taxes, or five times as much as the private person. There is here a discrimination too palpable and gross to be questioned; and such is the nature of the discrimination made against the Southern Pacific Railroad Company in the taxation of its property. Nothing can be clearer than that the rule of equality and uniformity is thus entirely disregarded.

"The case of *People* vs. *Weaver* (100 U. S., 539), decided by the Supreme Court, respecting the taxation of shares of the National Banks, may be cited in this connection. Without the permission of Congress, the shares of these banks could not be taxed by the States. Congress gave the permission, on condition that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that the shares owned by non-residents of the State should be taxed at the place where the bank is located. (R. S., Sec. 5219.) In the case cited, the Court held, with regard to such taxation: First, that the prohibition imposed by Congress against discrimination had reference to the entire process of assessment, and included the valuation of the shares as well as the rate of percentage charged; second, that a statute of New York, which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital, was in conflict with the prohibition, although the same percentage on such valuation was levied; and third, that a statute which per-

mitted a party to deduct his debts from the valuation of his personal property, except so much as consisted of those shares, taxed the shares at a greater rate than other moneyed capital. The assessment thus held to be a discrimination against the shares of National Banks in the taxation system of New York, is similar to what we hold to be a discrimination against the property of railroad corporations in the taxation system of California.

"In the case of the *Evansville Bank* vs. *Britton*, decided at the last term of the Supreme Court, the doctrine of the Weaver case was affirmed, and it was held that the taxation of shares in the National Banks, under the revenue laws of Indiana, without permitting the shareholder to deduct from their assessed value the amount of his *bona-fide* indebtedness, which was allowed in the case of other investments of moneyed capital, was a discrimination against the Act of Congress, and illegal. (105 U. S., 322.)" See opinion of Sawyer, C. J., commencing at page 298.

And in the case of the *County of Santa Clara* vs. *Southern Pacific Railroad Company*, 9 Sawyer, 182, the same learned Judge said:

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value — at a half or a quarter of it — and the property of another at more than its value — at double or treble it — according to the will or caprice of the State. To-day, railroad companies are under its ban, and the discrimination is against their property. To-morrow, it may be that other institutions will incur its displeasure. If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State by a change of its Constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill

companies, of mining companies, indeed of any corporate companies existing in the State. The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State Constitution would effect this, if the Federal Constitution does not forbid it. Any difference between the owners, whether of age, color, or race, or sex, which the State might designate would be a sufficient reason for the discrimination. It would be a singular comment upon the weakness and character of our republican institutions, if the valuation and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male, or female. A classification of values for taxation upon any such ground would be abhorrent to all notions of equality of right among men. Strangely indeed would the law sound in case it read that, in the assessment and taxation of property, a deduction should be made for mortgages thereon if the property be owned by white men or by old men and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit, or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

We call the especial attention of the Court to the opinion of Judge Sawyer in this case, commencing on page 229 (9 Sawyer).

We had thus far finished our argument when we were served

with appellant's points and authorities. We deem the principal points therein sufficiently answered in what precedes.

The Attorney-General complains that the Court below made no allusion to Section 13 of Article XIII of the Constitution of the State. While that section directs the Legislature to pass all laws *necessary* to carry out the provisions of the revenue and taxation article, we respectfully submit that all such laws must be in harmony with other provisions of the Constitution, and that the power conferred does not embrace *unnecessary* laws or those antagonistic to the legislative department article of the Constitution.

The Attorney-General contends that the inhibition is not against local or special laws in *pleading*, but in *practice*, and that pleading is not practice. In support of his view, he cites Abbott's Law Dictionary. Even this citation shows that practice may include pleading. Rapalye's and Lawrence's Law Dictionary gives the following definition of the word "practice": "The law of practice or procedure is that which regulates the formal steps in an action or other judicial proceeding. It therefore deals with writs, summonses, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs and executions." The words "practice" and "procedure" may be regarded as synonymous. It will certainly be new law to the older members of the bar, who have practiced in this State under the old Practice Act and under the Code of Civil Procedure, to learn that pleading is not practice. Is it possible, after the framers of the Constitution have prohibited special legislation of every conceivable form, and especially the regulation of the practice of courts of justice and such special legislation in all cases where a general law can be made applicable, that the inhibition does not apply to pleadings, because there is some question—according to the view taken by the Attorney-General—as to the definition of the word? We reply that such legislation is contrary not only to the letter, but to the spirit of the Constitution.

The case of *Whiting* vs. *Townsend*, 57 Cal., 517, cited by

appellant, and that of the *City of Stockton* vs. *The Western Fire & Marine Insurance Co. et al.*, 73 Cal., 621, which might have been cited, do not establish the doctrine that special laws of this character may, since the adoption of the Constitution of 1879, be passed by the Legislature. In both of these cases, the laws were passed even before the Code of Civil Procedure, and when it was constitutional to enact special laws.

There is no question that the State may classify property for purposes of taxation; but in making such classification *all* property of that kind or character must be treated alike. The vice of the legislation in question is that it does not apply to all railroads, but only to about one-half of the railroads in the State. Railroad corporations, organized under the same general law as were respondents, which have constructed their roads in the same manner, and operate them in all respects as do respondents, are not subject to the burdens imposed upon respondents by the legislation in question.

The Kentucky Tax Cases, 105 U. S., 321, cited by appellant, arose under a law which applied to *all* railroads in the State. The Supreme Court of the United States held that there was nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. We respectfully call the attention of the Court to the quotation from Judge Cooley, on page 11, and the quotation from the opinion of the Court in the Kentucky Tax Cases, on page 12 of appellant's points and authorities, to more fully sustain the contention *that all corporations of the same character must form one class and must be treated alike.*

We do not deem it necessary to refer to the case of *Paul* vs. *Virginia*, or to that of the *Pembina Mining Co.* vs. *Pennsylvania*, 125 U. S., 187, cited by appellant. The litigation in these cases grew out of the legislation of the States of Pennsylvania and Virginia concerning corporations transacting business in said States, which corporations had been chartered by other States. As corporations organized in one State cannot, except by comity, transact business in another State, it

was very properly held that the clause of the Federal Constitution which provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States does not apply to corporations. The question here is not between the State and foreign corporations, nor is it one between the State and a class or kind of corporation, but it is between the State and a portion of a class; and we most confidently contend that every member of the class, to wit, every railroad company in the State, is constitutionally entitled to every immunity and privilege conferred on any of the railroad companies in the State; that no burden can be imposed on one that is not imposed on all, and that any and all legislation violating these principles is null and void.

We apologize for the length of this argument, but the importance of the questions involved seemed to demand liberal quotations from the constitution and laws and from the decisions of the courts.

All of which is respectfully submitted.

HARVEY S. BROWN,
Attorney for Respondents.

CREED HAYMOND,
Counsel for Respondents.

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Office Supreme Court U. S.
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JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

CALIFORNIA RAILROAD TAX CASE.

PORTIONS OF CONSTITUTION AND LAWS OF THE STATE OF CALIFORNIA INVOLVED.

PREPARED BY DEFENDANTS IN ERROR.

Press of THOMAS McGILL & Co.

SUPREME COURT OF THE UNITED STATES.

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CALIFORNIA RAILROAD TAX CASE.

PORTIONS OF CONSTITUTION AND LAWS OF THE STATE OF CALIFORNIA INVOLVED.

PREPARED BY DEFENDANTS IN ERROR.

CONSTITUTION.

REVENUE AND TAXATION.

ARTICLE XIII.

SECTION 1. All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or

Taxation to be in proportion to value.

trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

Land and improvements to be separately assessed.

SEC. 2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land of the same quality and similarly situated shall be assessed at the same value.

Sectionized and unsectionized land, how assessed.

SEC. 3. Every tract of land containing more than six hundred and forty acres, and which has been sectionized by the United States Government, shall be assessed, for the purposes of taxation, by sections or fractions of sections. The Legislature shall provide by law for the assessment, in small tracts, of all lands not sectionized by the United States Government.

Securities, taxable.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. EXCEPT AS TO RAILROAD AND OTHER QUASI PUBLIC CORPORATIONS, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assess-

ment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

Contract of borrower to pay tax on loan void.

SEC. 5. Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void.

Power of taxation cannot be surrendered.

SEC. 6. The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party.

Payment of taxes by installments.

SEC. 7. The legislature shall have the power to provide by law for the payment of all taxes on real property by instalments.

Annual statement of property to be given.

SEC. 8. Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement under oath setting forth specifically all the real and personal property owned by such taxpayer, or in his possession or under his control, at twelve o'clock meridian, on the first Monday of March.

State Board of Equalization.

SEC. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex officio* a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property

in the county for the purpose of taxation; *Provided*, Such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe as to the county assessments and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll and make the assessment conform to the true value in money of the property contained in said roll.

Property, where assessed.

SEC. 10. ALL PROPERTY, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway road-bed, rails and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

Income tax.

SEC. 11. Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts and in such manner as shall be prescribed by law.

Poll tax.

SEC. 12. The Legislature shall provide for the levy and collection of an annual poll tax of not less than two dollars on every male inhabitant of this State over twenty-one and under sixty years of age, except paupers, idiots, insane persons, and Indians not taxed.

Said tax shall be paid into the State School Fund.

Laws to be passed by Legislature.

SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

ARTICLE XII.

Corporations to be formed under general laws.

SEC. 1. Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section may be altered from time to time or repealed.

ARTICLE IV.

Local and special laws prohibited.

SECTION 25. The Legislature shall not pass local or special laws in any of the following enumerated cases—that is to say:

First. Regulating the jurisdiction and duties of justices of the peace, police judges, and of constables.

Second. For the punishment of crimes and misdemeanors.

Third. REGULATING THE PRACTICE OF COURTS OF JUSTICE.

Fourth. Providing for changing the venue in civil or criminal actions.

Fifth. Granting divorces.

Sixth. Changing the names of persons or places.

Seventh. Authorizing the laying out, opening, altering, maintaining, or vacating roads, highways, streets, alleys, town plats, parks, cemeteries, graveyards, or public grounds not owned by the State.

Eighth. Summoning and impaneling grand and petit juries and providing for their compensation.

Ninth. Regulating county and township business, or the election of county and township officers.

Tenth. FOR THE ASSESSMENT OR COLLECTION OF TAXES.

Eleventh. Providing for conducting elections or designating the places of voting, except on the organization of new counties.

Twelfth. Affecting the estates of deceased persons, minors, or other persons under legal disabilities.

Thirteenth. Extending the time for the collection of taxes.

Fourteenth. Giving effect to invalid deeds, wills, or other instruments.

Fifteenth. Refunding money paid into the State treasury.

Sixteenth. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State or to any municipal corporation therein.

Seventeenth. Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.

Eighteenth. Legalizing, except as against the State, the unauthorized or invalid act of any officer.

Nineteenth. Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

Twentieth. Exempting property from taxation.

Twenty-first. Changing county seats.

Twenty-second. Restoring to citizenship persons convicted of infamous crimes.

Twenty-third. Regulating the rate of interest on money.

Twenty-fourth. Authorizing the creation, extention, or impairing of liens.

Twenty-fifth. Chartering or licensing ferries, bridges, or roads.

Twenty-sixth. Remitting fines, penalties, or forfeitures.

Twenty-seventh. Providing for the management of common schools.

Twenty-eighth. Creating offices or prescribing the powers and duties of officers in coun-

ties, cities, cities and counties, townships, election or school districts.

Twenty-ninth. Affecting the fees of salary of any officer.

Thirtieth. Changing the law of descent or succession.

Thirty-first. Authorizing the adoption or legitimation of children.

Thirty-second. For limitation of civil or criminal actions.

Thirty-third. In all other cases where a general law can be made applicable.

POLITICAL CODE.

ASSESSMENT OF PROPERTY.

Section 3627.

Property, how assessed. Taxes to.

ALL TAXABLE PROPERTY MUST BE ASSESSED AT ITS FULL CASH VALUE. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land of the same quality and similarly situated shall be assessed at the same value. A MORTGAGE, DEED OF TRUST, CONTRACT, OR OTHER OBLIGATION BY WHICH A DEBT IS SECURED SHALL, FOR THE PURPOSES OF ASSESSMENT AND TAXATION, BE DEEMED AND TREATED AS AN INTEREST IN THE PROPERTY AFFECTED THEREBY, EXCEPT AS TO RAILROAD AND OTHER QUASI-PUBLIC CORPORATIONS. In the case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated. The taxes so LEVIED SHALL BE A LIEN UPON THE PROPERTY AND SECURITY, and may

be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. (In effect March 7, 1881.)

Section 3629.

Contents of statement required by assessor.

He must exact from each person a statement, under oath, setting forth specifically all the real and personal property owned by such person or in his possession or under his control, at twelve o'clock, m., on the first Monday in March. Such statement shall be in writing, showing, separately:

1. ALL PROPERTY BELONGING TO, CLAIMED BY, OR IN THE POSSESSION OR UNDER THE CONTROL OR MANAGEMENT OF SUCH PERSON.

2. All property belonging to, claimed by, or in the possession or under the control or management of any firm of which such person is a member.

3. All property belonging to, claimed by, or in the possession or under the control or management of any corporation of which such person is president, secretary, cashier, or managing agent.

4. The county in which such property is situated, or in which it is liable to taxation, and (if liable to taxation in the county in which the statement is made) also the city, town, township, school district, road district, or other revenue districts in which it is situated,

5. An exact description of all lands in parcels or subdivisions, not exceeding six hundred and forty acres each, and the sections and fractional sections of all tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, improvements, and personal property, including all vessels, steamers, and other water craft, and all taxable State, county, city, or other municipal or public bonds, and the taxable bonds of any person, firm, or corporation, and deposits of money, gold dust, or other valuables, and the names of the persons with whom such deposits are made, and the places in which they may be found, all mortgages, deeds of trust, contracts, and other obligations by which a debt is secured, and the property in the county affected thereby.

6. All solvent credits, unsecured by deed of trust, mortgage, or other lien on real or personal property, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, deducting from the sum total of such credits such debts only, unsecured by trust deed, mortgage, or other lien on real or personal property, as may be owing by such person, firm, or corporation to *bona fide* residents of this State. No debt shall be so deducted unless the statement shows the amount of such debt, as stated under oath, in aggregate: *Provided*, In case of banks the statement is not required to show the debt in detail or to whom it is owing, but the assessor shall have

the privilege of examining the books of such banks to verify said statement. Whenever one member of a firm, or one of the proper officers of a corporation, has made a statement showing the property of the firm or corporation, another member of the firm or another officer need not include such property in the statement made by him, but his statement must show the name of the person or officer who made the statement in which such property is included. (In effect March 7, 1881.)

Section 3628.

Assessments, how, by whom.

The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. ALL OTHER TAXABLE PROPERTY shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by sections or fractions of sections. The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, AND ALL PROPERTY IN HIS COUNTY subject to taxation, except such as is required to be assessed by the State board of equalization, and must assess such property

to the persons by whom it was owned or claimed or in whose possession or control it was at twelve o'clock m. of the first Monday of March next preceding, but no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid. In assessing solvent credits not secured by mortgage or trust deed a reduction therefrom shall be made of debts due to *bona fide* residents of this State. (In effect March 22, 1880.)

Section 3650.

Property, how listed.

The assessor must prepare an assessment book, with appropriate headings alphabetically arranged, unless otherwise directed by the State board of equalization, in which must be listed all property within the county and in which must be specified in separate columns under the appropriate head:

1. The name of the person to whom the property is assessed.

2. Land, by township, range, section, or fractional section, and when such land is not a Congressional division or subdivision by metes and bounds or other description sufficient to identify it, giving an estimate of the number of acres (not exceeding in each and every tract six hundred and forty acres), locality, and the improvements thereon. When any tract of land is situate in two or more school, road, or other revenue district of the county the part in each township or district must be separately assessed, together with the improvements thereon.

3. City and town lots, naming the city or town and the number of the lot and block, according to the system of numbering in such city or town, and improvements thereon.

4. All personal property, showing the number, kind, amount, and quality, but a failure to enumerate in detail such personal property does not invalidate the assessment.

5. The cash value of real estate other than city or town lots.

6. The cash value of improvements on such real estate.

7. The cash value of city and town lots.

8. The cash value of improvements on city and town lots.

9. The cash value of improvements on real estate assessed to persons other than the owners of real estate.

10. THE CASH VALUE OF ALL PERSONAL PROPERTY, EXCLUSIVE OF MONEY.

11. The amount of money.

12. THE ASSESSMENT OF THE FRANCHISE, ROADWAY, ROAD-BED, RAILS, AND ROLLING-STOCK of any railroad, as apportioned to his county by the State board of equalization, and also such other apportionments of such franchises, roadways, road-beds, rails, and rolling-stock as may be made by such board and furnished to him for the purpose of taxation in any district in his county. Taxable improvements owned by any person, firm, association, or corporation located upon land exempt from taxation, shall, as to the manner of assessment, be assessed as other real estate upon the assessment roll. No value shall, however, be assessed against the exempt land, nor under any circumstances shall the land be charged with or become responsible for the assessment made against any taxable improvements located thereon.

13. The school, road, and other revenue districts in which each piece of property assessed is situated.

14. The total value of all property.

15. WHEN ANY PROPERTY, EXCEPT THAT OWNED BY A RAILROAD OR OTHER QUASI-PUBLIC CORPORATION, IS SUBJECT TO OR AFFECTED BY A MORTGAGE, DEED OF TRUST, CONTRACT, OR OTHER OBLIGATION BY WHICH A DEBT IS SECURED, HE MUST ENTER IN THE PROPER COLUMN, THE VALUE OF SUCH SECU-

RITY AND DEDUCT THE SAME. In entering assessments containing solvent credits subject to deductions as provided in section three thousand six hundred and twenty-eight of this code he must enter, in the proper column, the value of the debts entitled to exemption and deduct the same. In making the deductions from the total value of property assessed, as above directed, he must enter the remainder in the column provided for the total value of all property for taxation. EACH FRANCHISE MUST BE ENTERED ON THE ASSESSMENT ROLL WITHOUT COMBINING THE SAME WITH OTHER PROPERTY OR THE VALUATION THEREOF.

Franchise separately entered.

16. The figure one (1), in separate columns, opposite the name of every person liable to pay a poll-tax.

17. Such other things as the State board of equalization may require. The State board of equalization may direct the books to be otherwise than alphabetically arranged in any county or city and county of this State.

SEC. 10. So much of section three thousand six hundred and fifty of the political code as requires the assessor to put in a separate column of the assessment book the assessment of railways as apportioned to his county by the State board of equalization is hereby repealed. (In effect March 9, 1883.)

Section 3665.

Assessment as basis of taxation.

The State board of equalization must meet at the State capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. ASSESSMENT MUST BE MADE to the corporation, PERSON, or ASSOCIATION OF PERSONS

owning the same, and must be MADE UPON THE ENTIRE RAILWAY WITHIN THE STATE, AND MUST INCLUDE THE RIGHT OF WAY, BRIDGES, CULVERTS, WHARVES, AND MOLES UPON WHICH THE TRACK IS LAID, AND ALL STEAMERS WHICH ARE ENGAGED IN TRANSPORTING PASSENGERS, FREIGHTS, AND PASSENGER AND FREIGHT CARS ACROSS WATERS WHICH DIVIDE THE ROAD. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit by mail to the county auditor of each county, city and county to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the whole of the said track within the county, or city and county, including the right of way by metes and bounds or other description sufficient for identification, the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the State, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts then on the roll or book of any township or district he may select and enter the amount of the assess-

ment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation either of the county, city and county, or such township or district. On the first Monday in October the board of supervisors must make and cause to be entered in the proper record book an order stating and declaring the length of main track of the railway assessed by the board of equalization within the county the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxing district in the county, or city and county, through which such railway runs, as fixed by the State board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisers must transmit a copy of each order or equalization to the city council or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purpose as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the OWNER of a railway assessed by the State board of equalization is dissatisfied with the assessment made by the board, such OWNER may, at the meeting of the board, under the provision of section three thousand six hundred and ninety-one of the Political Code, between the third Monday in August and the third Monday in September, apply to the board to have the

same corrected in any particular, and the board may correct and increase or lower the assessment made by it, so as to equalize the same with the assessment of other property in the State. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment, of the change made, and the auditor must note such change upon the assessment book or roll of the county as directed by the board. (In effect, March 9, 1883.)

Section 3666.

"Record of Assessment of Railways;" how prepared.

The State board of equalization must prepare each year a book to be called "Record of Assessment of Railways," in which must be entered each assessment made by the board, either in writing, or both by writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of apportionment of the assessments made by the board to the counties, and cities and counties, must be made in a separate book, to be called "Record of Apportionment of Railway Assessments." In such last-described book must be entered the names of the railways assessed by the board, the names of the corporation to which, OR THE NAME OF THE PERSON OR ASSOCIATION TO WHOM, EACH RAILWAY WAS ASSESSED, the whole number of miles of railway in the State, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails, and rolling stock for purpose of State taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county taxation. Before the third Monday of October of each year the clerk of the State

board of equalization must prepare and transmit to the comptroller of States duplicates of the "Record of Assessment of Railways" and "Record of Apportionment of Railway Assessments," each certified by the chairman and clerk of the board, and to be known, respectively, as "Duplicate Record of Assessment of Railways" and "Duplicate Record of Apportionment of Railway Assessments." In the last-named duplicate two columns must be added, in one of which the controller must enter the State taxes due the State upon the whole assessment of each CORPORATION, PERSON, OR ASSOCIATION, and in the other the county, or city and county, taxes due upon the assessment apportioned to each county, or city and county, by each CORPORATION, PERSON, OR ASSOCIATION. The two duplicates constitute the warrant for the controller to collect the State and county, and city and county, taxes levied upon such property assessed by the Board, and the amount of the apportionment of the assessment to each county, and city and county, respectively. (In effect March 9, 1883.)

Section 3667.

Report of Board of Supervisors; transmission of, to controller.

When the Board of Supervisors of each county, and city and county, to which the State Board of Equalization has apportioned the assessment of railways shall have fixed the rate of county, or city and county, taxation, the clerk of the Board of Supervisors must forthwith, by mail, postage paid, transmit to the controller a statement of the rate of taxation levied by the Board of Supervisors for county, or city and county, taxation. If the clerk fails to transmit such statement, the controller must obtain the information as to such rate of taxation from other sources. On or before the fourth Monday of October the controller must compute and enter in separate money columns in the "Duplicate Record of Apportionment of

Railway Assessments" the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the CORPORATION, PERSON, OR ASSOCIATION liable therefor, as the State tax upon the total amount of the assessment and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such CORPORATION, PERSON, OR ASSOCIATION named in said duplicate record." (In effect March 9, 1883.)

Section 3668.

Publication of notice by Controller.

Within ten days after the fourth Monday in October, the Controller must publish a notice for two weeks in one daily newspaper of general circulation at the State Capital and in two daily newspapers of general circulation published in the city of San Francisco, specifying —

1. That he has received from the State Board of Equalization the "Duplicate Record of Assessments of Railways" and the "Duplicate Record of Apportionment of Railway Assessments."

2. That the taxes are now payable and will be delinquent on the last Monday in December next, at six o'clock p. m., and unless paid to the State Treasurer, at the Capitol, prior thereto, five per cent. will be added to the amount thereof. On the last Monday in December of each year, at six o'clock P. M., all of unpaid taxes are delinquent, and thereafter there must be collected by the State treasurer or other proper officer an addition of five per centum, which sum, when collected, must be set aside by the treasurer as a fund with which to pay the contingent expenses of actions against any delinquents; the said expenses to be audited by the board of examiners. When any taxes are paid to the State treasurer by order of the controller

upon assessments made and apportioned by the State Board of Equalization the controller must forthwith notify the auditor and treasurer, respectively, of each county, and city and county, that such taxes have been paid, and the amount thereof to which each county and city and county interested is entitled. The State's portion of the taxes must be distributed by the treasurer to each fund entitled thereto, and the portion belonging to the counties, and cities and counties, must be placed in a fund to be called "railway tax fund," to the credit of each county, and city and county, entitled thereto. When any taxes are placed in the "railway tax fund" to the credit of a county, or city and county, the controller, at the next settlement with the controller by the treasurer of such county, or city and county, must draw and deliver to such treasurer his warrant upon the State treasurer for the amount in the fund to the credit of such county or city and county. (In effect March 9, 1883.)

Section 3669.

Recovery of taxes illegally collected.

Each CORPORATION, PERSON, OR ASSOCIATION assessed by the State Board of Equalization must pay to the State treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county and city and county taxes each year levied upon the property so assessed to it or him by said Board. Any CORPORATION, PERSON, OR ASSOCIATION dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action may, not later than the first Monday of February, bring an action against the

State treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax or of the assessment upon which the taxes are levied in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney-general must defend the action. The provisions of the code of civil procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer upon presentation of a certified copy of such judgment to the controller he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county or city and county interested the proportion of such costs, or may deduct such proportion from any money then or to become due to said county or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action. (In effect March 9, 1883.)

Section 3670.

Collection of Delinquent taxes by controller.

After the first Monday of February of each year the controller must begin an action in the proper court in the name of the people of the State of California to collect the delinquent taxes upon the property assessed by the State board of equalization, such suit must be for the taxes due the State and all the counties and cities and counties upon property assessed by the board of equalization and appearing delinquent upon the "Duplicate record of apportionment of railway assessments." The demands for State and county and city and county taxes may be united in one action. In such action a complaint in the following form is sufficient:

(Title of Court.)

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

(Naming the Defendant.)

Plaintiff avers that on the — day of ——, in the year (naming the year), the State board of equalization assessed the franchise, roadway, roadbed, rails, and rolling-stock of the defendant at the sum of (naming it) dollars; that the board apportioned the said assessment as follows: To the county of (naming it) the sum of (naming it) dollars (and so on, naming each county).

That the defendant is indebted to the plaintiff for State and county taxes for the year eighteen —— in the following sums: For State taxes, in the sum of (naming it) dollars; for county taxes of the county of (naming it), in the sum of (naming it) dollars, etc., with five per cent. added for non-payment of taxes. Plaintiff demands payment for said several sums, and prays that an attachment may issue in form as prescribed in section

five hundred and forty-five of the Code of Civil Procedure.

(Signed by the comptroller or his attorney.)

On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had as under writs of attachment issued in civil action. No bond nor affidavit previous to the issuing of the attachment is required. If in such action the plaintiff recover judgment, there shall be included in the judgment as counsel fees, and in case of judgment of taxes after suit brought before judgment the defendant must pay as counsel fees such sum as the court may determine to be reasonable and just. Payment of the taxes on the amount of the judgment in the case must be made to the State treasurer. In such action the duplicate record of assessments of railways and the duplicate record of apportionment of railway assessments, or a copy of them certified by the controller, showing unpaid taxes against any corporation, person, or association for property assessed by the State board of equalization, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of the taxes due and unpaid to the State and counties, or cities and counties, therein named, and that the corporation, person, or association is indebted to the State of California in the amount of taxes, State and county, and city and county therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. (In effect March 9, 1883.)

Section 3664.

Assessment of railway property by State board of equalization.

The president, secretary, or managing agent, or such other officer as the State

board of equalization may designate, of ANY CORPORATION, and EACH PERSON OR ASSOCIATION OF PERSONS OWNING OR OPERATING ANY RAILROAD IN MORE THAN ONE COUNTY in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement signed and sworn to by one of SUCH OFFICERS, OR BY THE PERSON, OR ONE OF THE PERSONS, FORMING SUCH ASSOCIATION, showing in detail for the year ending on the first Monday of March in each year:

1. The whole number of miles of railway in the State, and where the line is partly out of the State, the whole number of miles without the State, the whole number within the State owned and operated by such corporation, person, or association.

2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the State.

3. The width of the right of way.

4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling stock owned and operated in the State.

6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns.

7. Number, kind, and value of rolling stock owned, but used out of the State, either upon divisions of road operated by the party making the returns, or by and upon other railways.

Also showing in detail for the year preceding the first of January:

1. The gross earnings of the entire road.

2. The gross earnings of the road in the State, and where the railway is let to other operators, how much was derived by the lessor as rental.

3. The cost of operating the entire road, exclusive of sinking fund, expenses of land department, and money paid to the United States.

4. Net income of such year, and amount of dividend declared.

5. Capital stock authorized.

6. Capital stock paid in.

7. Funded debt.

8. Number of shares authorized.

9. Number of shares of stock issued.

10. Any other facts the State Board of Equalization may require.

11. A description of the road, giving the points of entrance into and the point of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given no other annual description thereafter is necessary unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold, for taxes, either State or county, no other description is necessary than that given by, and the same is conclusive upon, the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway or the right of way for the same. If such statement is not furnished, as above provided, the assessment made by the State Board of Equalization upon the property of the CORPORATION, PERSON, or ASSOCIATION failing to furnish the statement is conclusive and final. (In effect March 9, 1883.)

NOTE.—This section is cited to show that the laws of California recognize the fact that natural persons and associations, not corporate, may, and do, own and operate railroads.

Section 3665 shows the same thing.

Section 3666 shows the same thing.

And section 1001 of the Civil Code, and sections 1237, 1238, 1240, and 1244 of the Code of Civil procedure contain express authority and confer express authority to that effect.

CIVIL CODE.

SECTION 14 declares that the word "person" includes corporations. Persons and corporations.

CARRIERS.

SEC. 2110. Property carried is called freight; the reward, if any, to be paid for its carriage, is called freightage; the person who delivers the freight to the carrier is called the consignor, and the person to whom it is to be delivered is called the consignee. General definitions.

SEC. 2168. Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry. What constitutes a common carrier.

SEC. 2170. A common carrier must not give preference, in time, price, or otherwise, to one person over another. Every common carrier of passenger by railroad, or by vessel plying upon waters lying wholly within this State, shall establish a schedule time for the starting of trains or vessels from their respective stations or wharves, of which public notice shall be given, and shall, weather permitting, except in case of accident or detention caused by connecting lines, start their said trains or vessels at or within ten minutes after the schedule time so established and notice given, under a penalty of two hundred and fifty dollars for each neglect so to do, to be recovered by action before any court of competent jurisdiction, upon com- Obligation not to give preference.

plaint filed by the district attorney of the county in the name of the people, and paid into the common-school fund of the said county.

PERSONS.

Divisions of civil code.

SEC. 1. This act shall be known as the Civil Code of the State of California, and is in four divisions, as follows:

I. The first relating to persons.

II. The second to property.

III. The third to obligations.

IV. The fourth contains general provisions relating to the three preceding divisions.

CORPORATIONS.

Corporation defined.

SEC. 283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

For what purp se private corporations are formed.

SEC. 286. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Powers of corporations.

SEC. 354. Every corporation, as such, has power—

1. Of succession, by its corporate name, for the period limited, and, when no period is limited, perpetually;

2. To sue and be sued in any court;

3. To make and use a common seal, and alter the same at pleasure;

4. To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part;

5. To appoint such subordinate officers or agents as the business of the corporation may require and to allow them suitable compensation.

6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

7. To admit stockholders or members and to sell their stock or shares for the payment of assessments or instalments.

8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs or for the purposes of the corporation.

MINING PARTNERSHIPS.

When a mining partnership exists.

SEC. 2511. A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the same,

Express agreement not necessary to constitute.

SEC. 2512. An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in the mine and working the same for the purpose of extracting the minerals therefrom.

Profits and losses, how shared.

SEC. 2513. A member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to whole partnership capital or whole number of shares.

Lien of partners.

SEC. 2514. Each member of a mining partnership has a lien on the partnership property for the debts due the creditors thereof and for money advanced by him for its use. This lien exists notwithstanding there is an agreement among the partners that it must not.

Mine—partnership property.

SEC. 2515. The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property.

Partnership not dissolved by sale of interest.

SEC. 2516. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. The purchaser, from the date of his purchase, becomes a member of the partnership.

Purchaser takes subject to lien unless, &c.

SEC. 2517. A purchaser of an interest in the mining ground of a mining partnership takes it subject to the liens existing in favor of the partners for debts due all creditors thereof or advances made for the benefit of the partnership, unless he purchased in good faith for a valuable consideration without notice of such lien.

Takes with notice of lien, when.

SEC. 2518. A purchaser of the interest of a partner in a mine when the partnership is engaged in working it takes with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

Contract in writing, when binding.

SEC. 2519. No member of a mining partnership or other agent or manager thereof can, by a contract in writing, bind the partnership, except by express authority derived from the members thereof.

Owners of majority of shares govern.

SEC. 2520. The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business.

EMINENT DOMAIN.

Property, how acquired.

SEC. 1000. PROPERTY is acquired by—

1. Occupancy.
2. Accession.
3. TRANSFER.
4. Will; or
5. Succession.

Acquisition of property by exercise of eminent domain.

SEC. 1001. ANY PERSON MAY, WITHOUT FURTHER LEGISLATIVE ACTION, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, EITHER BY CONSENT OF THE OWNER OR BY PROCEEDINGS HAD UNDER THE PROVISIONS OF TITLE VII., PART III, OF THE CODE OF CIVIL PROCEDURE; and ANY PERSON seeking to acquire property for any of the uses mentioned in such title is "an agent of the State," or a "PERSON in charge of such use," within the meaning of those terms as used in such

title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

CODE OF CIVIL PROCEDURE.

EMINENT DOMAIN.

Eminent domain defined.

SEC. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

Purposes for which it may be exercised.

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy-yards, navy and army stations, light-houses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for the use of the State, and all other public uses authorized by the Legislature of this State.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town, or school districts, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village or town, or for draining any county, incorporated city, or city and county, village, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village, or town, or the ininhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and correcting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, shutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, STEAM AND HORSE RAILROADS, canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences and farms.

7. Telegraph lines.

8. Sewerage of any incorporated city, or city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

Private property defined; classes enumerated.

SEC. 1240. The private property which may be taken under this title includes—

1. All real property belonging to any person.

2. Lands belonging to this State, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use.

3. PROPERTY APPROPRIATED TO PUBLIC USE; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll-roads, toll-bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for

free highways, railroads, or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

Section 1244.

The complaint must contain:

The complaint and its contents.

1. The name of the CORPORATION, ASSOCIATION, COMMISSION, or PERSON in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route, and *termini*, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use,

may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

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Office Supreme Court U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 257.

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF IN ERROR,

vs.

THE SAN PABLO AND TULARE RAILROAD COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief of Mr. Harvey S. Brown on Motion to Dismiss Writ of Error.

The writ of error herein should be dismissed, because the Attorney General frankly admits in his brief, at pages 6 and 7, that the defendant in the year 1893 offered and tendered to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee to recover which this action was brought and costs of suit, and that the tender had not been accepted, but that the money had been deposited by the defendant in bank, in accordance with the provisions of sec-

tion 1500 of the Civil Code of California. By the provisions of said section the obligation to pay said taxes has thereby been extinguished.

In consequence of this admission the defendant has not, as it otherwise would have done, prepared affidavits setting forth the aforesaid facts.

This Court has so often and so emphatically declared that it will not pass upon a legal question *unless there is a real controversy between the parties to the action* that I deem it unnecessary to do more than cite the cases of Little against Bowers, 134 U. S., pages 547–556, and San Mateo County against Southern Pacific Railroad Company, 116 U. S., page 138.

In the later case there was a stipulation that the judgment rendered in it should affect other cases in the same manner as is claimed that the stipulation in folio 20 of the Record affects this case, but notwithstanding the writ of error was dismissed.

By examining the second stipulation in this case (see folio 33 of Record) it will be clearly seen that there was not the slightest intention to make the judgment rendered in this case apply to any other action or actions. This will be seen by a simple reference to paragraphs XI and XII.

We therefore respectfully ask that the writ of error herein be dismissed; but in case this motion should be denied we then ask that the judgment of the court below be affirmed on the ground that the supreme court of the State of California has decided in the case of The State of California *vs.* Central Pacific Railroad Company (see 83 Cal., page 393) that the whole scheme for the collection of taxes provided by the political code against railroads operated in more than one county is in contravention of the constitution of the State of California, and upon this point I refer to my brief upon this subject, herewith filed.

HARVEY S. BROWN,
Of Counsel for Defendant in Error.

Office. Supreme Court U. S.
FILED.
OCT 25 1889
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY, Defendant in Error.

No. ~~1,407.~~ 257

Motion to Advance.

Now come the plaintiffs in error, by counsel, and move the court to advance the above-entitled cause, and present the following brief statement of the matters involved and reasons for such advancement.

MATTERS INVOLVED.

The plaintiffs in error sued the defendant in error in the Superior Court of the City and County of San Francisco, California, to recover certain sums assessed as taxes for State and county purposes for the year 1885, by the State Board of Equalization, on defendant's franchises, roadway, roadbed, rails, and rolling-stock in the counties of Alameda, Coutra Costa, and San Joaquin, through which defendant's road passes, specifying in the complaint the amount claimed as State taxes, and the amounts claimed for said counties, respectively, for county purposes.

The defendant answered, and on its motion the case was transferred to the Circuit Court of the United States for the District of California, a jury was waived, and the case submitted upon testimony taken and filed in the case of the People *v.* The Central Pacific Railroad Company, with a stipulation that an appeal should be taken in that case to this court, and the decision in said last-named case should be decisive of this, if upon the points involved in this case, and if not upon such points, then any judgment rendered by the court below in this case was to be set aside, and special findings of fact had.

The judgment went for the defendant in error. The people appealed the case of People *v.* The Central Pacific Railroad Company, and the case was advanced on their motion at the October term, 1887, of this court.

The points involved in the decision by this court of the case of The People *v.* The Central Pacific Railroad Company, not being applicable to the case at bar, the former case involving a Federal franchise, which the latter case did not involve, the judgment rendered in the case at bar was set aside pursuant to the stipulation, and the respective counsel, having agreed on the facts, special findings were had and filed, based on the agreed statement of facts, but the conclusion of law was the same—that the defendant in error was entitled to judgment, and such judgment was accordingly entered. It is from this judgment that this appeal is taken.

It is a matter of congratulation to both sides of this controversy, that all local or State questions are eliminated from the findings, and simply a federal question presented whether or not section 4, article 13 of the State Constitution, and the laws of the State of California passed in pursuance thereof, are violative of the Fourteenth Article of Amendment to the Constitution of the United States.

Section 4, referred to, reads as follows:

"A mortgage, deed of trust, contract, or other obligation, by which a debt is secured shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other *quasi*-public corporations, in cases of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on that security it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *Provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

It is distinctly found by the court that the assessment in this case did not include any property except the franchise, roadway, roadbed, rails and rolling-stock, thus eliminating all local questions as to fences, steamers, &c., and that the State Board of Equalization assessed the property at the full cash value without deducting therefrom the value of a mortgage on the road or any part thereof, which was given to secure the indebtedness of the railroad company to the holders of its bonds, though the State Board had full knowledge of such mortgage, but that they assessed the whole value of said property to defendant in the same manner as they would have done had there been no mortgage thereon, and upon the

same basis for valuation as all other property in said State.

The court further found that defendant in error had legal notice of said assessment, appeared before the State Board of Equalization, and had a full and legal hearing on the matter of said assessment, and also that all railroads operated in more than one county in said State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of defendant.

The court further found that no part of the said taxes had been paid by the defendant.

Reasons for Advancing.

Under the Constitution and laws of the State, the State officials must take into account, and make assessments upon, this species of property in making provision for revenues for State and county purposes. And under the Constitution and laws these officials cannot make the deductions the defendant is claiming in this case in making the assessments. They must continue to assess, and without deductions, until it shall have been determined by this court that such property is not subject to State taxation, or, if so subject, is entitled to these deductions.

It, therefore, needs neither illustration nor argument to show that the finances of the State, and provision for its institutions, are seriously affected by delay in getting these questions determined.

In the motion to advance the case of The People of the State of California *v.* The Central Pacific Railroad Company, No. 664, at the October Term, 1887, of this court, an affidavit of the Controller of State was made an exhibit, to wit, "Exhibit A," to which reference is hereby made, and said affidavit is hereto attached as

"Exhibit A," in which that officer estimated the total deficit of the railroads, including the taxes of 1887, to be $2,572,738.25, and that sum dependent on the result of the questions involved in the cases at that time before the court. Such deficit resulted from the omission of the railroads concerned to pay taxes for several years, and such omission is owing to the legal controversy to be determined by this court in this case. This status, as to such taxes, still continues.

The questions involved are the more serious and disturbing because of the extent in value of this class of property. So long as it is treated as taxable, and without deductions, and that tax not paid, there must be a large deficit in the revenues.

If it is not subject to such taxation, the State authorities should early be advised of that fact, to the end that rates can be made as to property that is taxable, which will afford the necessary revenue to carry on the State and county affairs.

We expressly urge upon the consideration of the court the fact that the State officials must deal with this matter of assessment in the way pointed out by the Constitution and laws of the State, and, what is still more important, the Legislature of California must, in its enactments, conform to the Constitution of the State until it is conclusively determined, if it shall be so determined, that that constitutional provision and the laws in furtherance of it are, as contended in this case by the railroad companies, in conflict with the Fourteenth Article of Amendment.

It is mainly because the administration of public affairs of this State is so seriously involved that the court is respectfully asked to advance this case.

It was for such reasons as above that at the October Term, 1887, of this court, five railroad cases were advanced by this court, but local questions intervened, or a ques-

tion involving the taxation of federal franchises, which prevented the court from reaching and definitely deciding the paramount federal question presented by this record. In this case there is no federal franchise involved, no disturbing local issue.

In the case of San Bernandino Co. *v.* Southern Pacific Railroad Company, 118 U. S., p. 422, Mr. Justice Field, in his concurring opinion, says: "I agree to the judgment of the court in this as also in the other tax cases from California. But I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered at the Circuit Court, and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made between the property of the defendant and the property of individuals, to its disadvantage, thus subjecting it to an unequal share of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution."

The learned Justice again reiterated his regret that the federal questions could not then be decided.

G. A. JOHNSON,
Attorney-General of California,
and SAMUEL SHELLABARGER,
J. M. WILSON,
Attorneys for Plaintiffs in Error.

Exhibit "A."

In the Supreme Court of the United States.

The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 660.
The People of the State of California, Plaintiffs in Error, *vs.* The Southern Pacific Railroad Company.	No. 661.
The People of the State of California, Plaintiffs in Error, *vs.* The Northern Railway Company.	No. 662.
The People of the State of California, Plaintiffs in Error, *vs.* The California Pacific Railroad Company.	No. 663.
The People of the State of California, Plaintiffs in Error, *vs.* The Central Pacific Railroad Company.	No. 664.

STATE OF CALIFORNIA, *County of Sacramento*, } *ss:*

John P. Dunn, being duly sworn, deposes and says that he is the Controller of State of said State of California, and has been such controller for more than four years last past, and that he is the said John P. Dunn mentioned in the said cause or causes above named; that as such controller the whole financial department of the State Government has been under his immediate supervision, and he finds the following to be the facts in regard to the taxation of railroads in said State:

II.

In the year 1880 the railroad corporations of the State

belonging to the Central Pacific and Southern Pacific systems made default in the payment of their taxes.

Again, in 1881, 1882, 1883, 1884, 1885, and 1886, default was made and suits instituted for the recovery of the sums claimed to be due, and of these the cases involving the taxes of 1883, 1884 (if appealed), 1885, and 1886 are yet to be heard in the Supreme Court of the United States. Of the taxes levied against the said railroad corporations, a portion thereof has been paid by reason of certain compromises entered into between the said corporations and certain officials of the State and county governments. The amounts tendered and paid on account of such taxes have in no instance been of the full amount demanded by the State, but were only of the amount which the representatives of the railroad corporations declared themselves "minded to pay." But no money has been paid on the taxes levied for the years 1885 and 1886.

III.

That of the taxes levied against the said delinquent railroad corporations for the years 1883, 1884, 1885, and 1886, there remains unpaid the sum of $1,915,738.25, exclusive of any and all claims for interest, penalties, costs, &c., accruing by reason of such delinquency. In addition to this sum must be added the taxes of 1887, which it is estimated will amount to $657,000 making a total of $2,572,738.25, now dependent on the result of the questions involved in the cases before the court.

IV.

This protracted litigation, extending over a period of six years, and the yearly default in the payment of the taxes assessed against these railroads, have resulted in the utmost confusion to the finances of the State and counties. This confusion has entered into the affairs of the State and counties, the school districts and the road districts. And deponent says, on his information and belief, that roads have been neglected and school houses compelled to close their doors before the completion of the school year on account of the failure of the said railroads to pay their taxes. These matters, with the depleted

condition of the State and county treasuries, are some of the effects produced by non-payment of the taxes levied against these corporations. It looks as if the people of the State have been forced to the conclusion that the property of railroad corporations is exempt from the burdens which attach to other property, and is not to be considered in establishing the yearly rate of taxation upon the taxable property of the State, since every effort thus far made by the State to obtain a conclusive determination of the issues involved has met with defeat. As soon as the questions involved in said pending causes are definitely settled by this learned tribunal, then, and not till then, will the State know its rights in these matters, and be able to redress these grievances.

Subscribed and sworn to before me this 23d day of September, 1887.

JOHN DUNN.

J. J. PAULSEEL, [SEAL.]
Dep'ty Clerk, Supreme Court.

IN THE

Supreme Court of the United States.

October Term, 1889.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY.

No. ~~1467.~~ 257

In Error to the Circuit Court of the United States for the Northern District of California.

BRIEF FOR PLAINTIFFS IN ERROR.

By SAMUEL SHELLABARGER and JEREMIAH M. WILSON.

SACRAMENTO:
STATE OFFICE, : : : J. D. YOUNG, SUPT. STATE PRINTING.
1890.

IN THE

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,
vs.
THE SAN PABLO AND TULARE RAILROAD COMPANY.

No. 1467.

In Error to the Circuit Court of the United States for the Northern District of California.

This case is one where the trial below was conducted under the provisions of Sections 649 and 700 of the Revised Statutes. No exceptions were taken to the rulings during the progress of the trial, and the only questions which can be reviewed by this Court under the writ of error are such as are embraced by the last clause of Section 700, which provides that "when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

If the fact were that the agreed statement, found at pages 26 to 30 of the record, were broader and included more facts than, or different facts from, those stated in the findings by the Court, that would not change the character of the questions reviewable here; because—

"Where a case is tried by a Circuit Court, without a jury,

and the Court makes a special finding of facts, but omits to find certain facts which a stipulation between the parties, made after the entry of judgment, states were shown by proof at the trial, this Court, on a writ of error, can take notice only of the facts contained in the special finding."

Tire and Spring Works Company vs. *Spaulding*, 116 U. S. 541.

The findings of facts by the Court are special, and are set forth at R. 20 to 24, inclusive.

We give now, in an abstract, the pith of these respective findings.

The Court, pursuant to stipulation, vacates the former judgment in the case and recites that the parties, by written stipulation, waived a jury and submitted the case for hearing to the Court.

FINDING I.

That former action in the case was brought without authority of law, and is no part of the present action; and that former suit prior to present action was dismissed.

FINDING II.

Finds defendant a corporation under California laws, and constructed a railroad line extending through several counties in California, to wit: San Joaquin, Alameda, and Contra Costa; that principal place of business is San Francisco; that some of the stockholders are citizens of the United States, resident in California and some residents of other States; that total length of road is forty-six (46) miles—8.50 being in San Joaquin, 1.40 being in Alameda, and 36.10 being in Contra Costa.

FINDING III.

That August 15, 1885, State Board of Equalization, acting under and by virtue of power conferred by State Con-

stitution, assesses "the franchise, roadway, roadbed, rails, and rolling stock of defendant at the sum of $900,000," and apportioned it as follows: To Alameda County, $27,392; to Contra Costa, $706,304; to San Joaquin, $166,304.

That taxes were levied on said assessment in the manner provided by law for the levy of taxes on railroad companies owning railroads operated in more than one county for the fiscal years 1885, 1886, in the following sums: For State taxes, $4,896; county tax, Alameda County, $248 17; county tax, Contra Costa County, $4,633 35; county tax, San Joaquin County, $924 65.

That after making said assessment the State Board of Equalization performed all acts, duties, and things by law required to be done concerning the said assessment, and all the acts, duties, and things required by the Constitution of the State, and by the laws passed in conformity therewith, concerning the levy and collection of taxes alleged to be due the plaintiff from the defendant, were done and performed prior to the commencement of this action.

Finding IV.

That on September 2, 1878, defendant was indebted to divers persons, citizens of the United States, and many of them now citizens and residents of California, in large sums advanced to construct, etc., its road; that to secure payment of that indebtedness defendant, on said September 2, 1878, "executed and delivered a mortgage on its said road, its franchises, and all rolling stock and appurtenances;" that this mortgage exceeded $3,000 per mile of the road, and no part had been paid, except interest, and the whole is now, and ever since the execution of the mortgage has been, a valid and subsisting indebtedness against the company, and is still secured by said mortgage.

FINDING V.

That said assessment was made for the purpose of taxation for the fiscal year of the State, beginning July 1, 1885, and ending June 30, 1886, "upon the franchise, roadway, roadbed, rails, and rolling stock of said road against said defendant;" that the assessment was not made separately upon the franchise, roadway, roadbed, rails, and rolling stock of said road, but all of said properties were blended together in making said assessment, which was then and there so entered upon the minutes of the Board. And this assessment is the one on which the taxes mentioned in the complaint are based. That no other assessment, than that aforesaid, was ever made on said property, or any part thereof, for said fiscal year. That in said assessment there was not included any other property or kinds of property, belonging to defendant corporation, except the said franchise, roadway, roadbed, rails, and rolling stock, and said assessment did not include any other of the property, or kinds of property mentioned in Section 3665 of the Political Code of the State of California, as amended March 9, 1883, except said franchise, roadway, roadbed, rails, and rolling stock.

FINDING VI.

That the Board of Equalization, in making the assessment, assessed against defendant the full cash value of the railroad, roadbed, rails, rolling stock, and franchise, without deducting therefrom the value of any indebtedness of the company to the holders of the bonds, notwithstanding they had full knowledge of the existence of the mortgage.

FINDING VII.

That in making said assessment the State Board of Equalization, acting under power conferred by the Consti-

tution of California, did not deem or treat the mortgage as an interest in said property, but it assessed the whole value of the property to defendant in the same manner it would have been had there been no mortgage thereon.

FINDING VIII.

By the provision of the Constitution of California, and laws pursuant thereto, the right and privilege to be heard in relation to assessments is granted to defendant in respect to the property in question; and that before and at the time of said assessment defendant had full, due, and legal notice thereof, and appeared before the Board of Equalization, and had full legal hearing on the matter of the making of the assessment.

FINDING IX.

That all railroads owned and operated in more than one county in said State, whether owned by corporations or individuals, were and are assessed in the same manner as the railroad of said defendant.

FINDING X.

That from 1883 to 1886, and during all the times herein mentioned, there was a railroad in use and operation in California, from Marysville, in Yuba County, to Oroville, in Butte County, a distance of twenty-seven miles; which was operated in more than one county, was of the same grade as defendant's road, and is operated for like purposes; that said road, with its equipments, during said time was in the ownership of N. D. Rideout, a citizen of the United States, and resident of California; that there was, during the same period, a railroad from Santa Cruz, extending thence into the County of Monterey, a distance of twenty-one miles; and another road, during said period, for like uses with

defendant's road, in the ownership of a private corporation, called the Pacific Improvement Company, formed under the laws of California, which has never been a railroad corporation; and that there was, during said period, and is now, divers other railroads owned and operated in California, and by corporations other than railroad corporations, and by individuals and partnerships.

FINDING XI.

That the State Board of Equalization, in making said assessment, did not include in the value of the roadway, or at all, in said assessment the value of the fences erected upon the land of coterminous proprietors, or include in said assessment the value of any fences whatever, and did not include the said roadway at a greater value than the value of other property similarly situated, or greater than its actual value.

FINDING XII.

That the State Board of Equalization in making said assessment did not assess the said franchise, roadway, roadbed, rails, or rolling stock of the said defendant, or any part thereof, for more than their actual value, or more than their actual cash value, and did not, in making up the valuation of any part of the said property so assessed, include the value of any other property of any kind or nature whatever, and did make the said assessment upon the same basis for valuation as all other property in the said State is valued for purposes of taxation.

FINDING XIII.

That no part of the taxes alleged to have been imposed upon the property of defendant as aforesaid has ever been paid.

On this series of findings of fact, the Court found that the defendant was entitled to a judgment of the dismissal of the action, with costs, and ordered judgment to be entered for defendant with costs; this on the thirtieth of September, 1889 (R. 24).

Assignment of Errors.

The assignment of errors in the case is found at page 33, and is in the following words:

"That by the record aforesaid it appears that said judgment was given for said defendant and against said plaintiff, whereas, by the law of the land it ought to have been given for said plaintiff and against said defendant.

"That the said Circuit Court erred in ordering judgment to be entered for said defendant upon the findings of facts made and filed by said Court in said cause.

"That said Circuit Court erred in not ordering judgment to be entered upon said findings of facts for said plaintiff and against said defendant for the recovery of the amount of the taxes sued for in said cause.

"That said Circuit Court erred in deciding that in and by the assessment of the property of said defendant for the purposes of taxation the said defendant was denied the equal protection of the laws."

The provisions of the Constitution of California which are brought into view in the present case are set forth in the principal brief—that of the Attorney-General—and are also found conveniently brought together in the case of *California* vs. *Pacific R. R. Co.*, 127 U. S. 412, and, therefore, this brief will not be incumbered with the same, except to state particular parts which are supposed to control this case.

These clauses are as follows:

Constitutional Provisions.

Sections 1, 2, 4, 9, and 10, of Article XIII, of the Constitution of California provide as follows:

"SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

"SEC. 2. Land and the improvements thereon shall be separately assessed, etc.

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroads and other quasi public corporations, in cases of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year.

"SEC. 9. A State Board of Equalization, consisting of one member from each Congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose

duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex officio* a member of this Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe, as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and district."

Section 1 of Article XII provides:

"Corporations may be formed under general laws, but shall not be created by special Act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Section 11 of Article I provides:

"All laws of a general nature shall have a uniform operation."

STATUTORY PROVISIONS.

Sections 3617, 3627, 3628, 3629, 3664, 3665, 3669, 3670, 3671, 3672, 3673, 3674, 3676, 3692, and 3693 of the Political Code of California, provide as follows:

Section 3617, third subdivision:

"The term 'improvements,' includes—1. All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land. [In effect March 7, 1881.]

"SEC. 3627. All taxable property must be assessed at its full cash value. Land and improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value. *A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi public corporations. In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situated.* The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge thereof. If any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year; and every contract by which a debtor is obliged to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void. [In effect March 7, 1881.]

"SEC. 3628. *The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of*

Equalization, as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county, within which they were granted; if granted by any other authority they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. Land shall be assessed in parcels or subdivisions not exceeding six hundred and forty acres each, and tracts of land containing more than six hundred and forty acres, which have been sectionized by the United States Government, shall be assessed by section or fractions of sections. The Assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock M. of the first Monday of March next preceding; but no mistake in the name of the owner, or supposed owner of real property, shall render the assessment thereof invalid. *In assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to bona fide residents of this State.*" [In effect March 22, 1880.]

It will be perceived thus, by reference to finding of fact number five, that the taxes mentioned in the complaint in this case were based upon an assessment for taxation of the "franchise, roadway, roadbed, rails, and rolling stock of the road;" that these were all blended together in making the assessment; that no other property than that just named was included in the assessment; and, by finding number six, that no deduction was made on account of the mortgage mentioned in finding number four; and, by finding number seven, that the State Board of Equalization did not deem the mortgage an interest in the property, but assessed the property at its value as if there had been no mortgage; and, by finding number eight, that full hearing was had regarding this assessment and taxation; and, by

finding number nine, that all railroads in the State, whether owned by individuals or corporations, which extended into more than one county, are assessed in the *same* manner as defendant was, without deduction; and, by finding number twelve, that the valuation was fair and just, and was made on the same basis as all other property is valued for taxation; and, by finding number three, that all the steps in making the assessment and assessing the taxes were such as required by law.

There is no indication in the record as to what the grounds were upon which the Court below ordered the suit of the plaintiff to be dismissed and the judgment for defendant with costs.

Under the findings of fact and the state of the law the result of the case below *must* have been reached on the ground that no deduction was made in the assessment on account of the mortgages named in finding number four. In other words, in making this assessment and the taxation thereon, the authorities of the State *obeyed* the provisions of Section 10, Article XIII, of the Constitution, which required them, because this railroad was operated in more than one county, to assess the property at its actual value, and to apportion it between the counties, cities and counties, cities, towns, townships, and districts in which located, in proportion to the miles of railway therein, respectively; and further obeyed the provisions in Section 4, Article XIII, of the Constitution, which provides that in making assessments for taxation, railroads and other quasi public corporations should be excepted from the provision of said Section 4, which required that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby;" and further providing that the property affected by the mortgage shall, as to the *excess*, in value, above the mort-

gage, be taxed to the owner of the property, and as to the value of the mortgage shall be taxed to the owner of the mortgage.

We now proceed to consider whether this assessment for taxation is illegal, either because the provisions of the Constitution, and of the laws of California, which direct the making of said distinction, for purposes of taxation, between railroads and all other taxpayers, are violative of the fundamental principles of free government, or because such provisions and distinction violate the equality clause of the fourteenth amend-ment of the Constitution.

Stated in another way, it seems to us quite plain, from taking a view of the findings of fact in connection with the decisions heretofore made in the Circuit Court in like cases, such, for example, as the case of the Santa Clara Railroad tax cases, in 9 Sawyer, 165, that the ground of defense against this tax must be that, whilst Sections 4 and 10, Article XIII, of the State Constitution, and the statutes made in pursuance thereof, allow and require, in the case of all property *not* owned by railroads and other quasi public corporations, that, in making assessments for taxation, only the *excess* of the value thereof, above unsatisfied incumbrances thereon, shall be taxed, yet, in the case of railroads and other quasi corporations, the *full* value of like property of such corporations, so incumbered, is assessed and taxed, and that the assessment was so made in the present case.

It will thus be seen that the principal questions presented by this record are the following:

First—Inasmuch as the Constitution of California provides that in assessing property held by individuals for taxation the amount of incumbrances by mortgage is declared to be an interest in the property, and shall be assessed against the mortgage, and the value in excess of the mortgage shall be assessed against the owner; and in-

asmuch, as in cases of such corporations as the defendant, no such division is provided for or permitted;—is this a denial to that company of the equal protection of the laws as contemplated by the fourteenth article of amendment of the Constitution of the United States?

Second—Is the tax in this case illegal because the said assessment was not made separately upon the franchise, roadway, roadbed, rails, and rolling stock of said railroad, but because all of the said properties were blended together in making said assessment on which the taxes sued for in this case were based (as stated in Finding V, R. 22).

BRIEF.

At the opening of the discussion we propose to make in the present brief, we desire to carefully eliminate from this case all matters which do not belong to the present case, but which entered into the cases which have come from California to this Court hitherto, and which cases are, in some respects, identical with the present case; such as the case of *California* vs. *Central Pacific Railroad Company et al.*, reported 127 U. S., p. 1 *et seq.* Also *Santa Clara Case*, 9 Sawyer, 165.

In attempting to so exclude from this case all extrinsic questions, please observe the following points:

1. In this case no franchise was assessed or taxed which emanated from the United States Government, or other than was conferred by the State of California (as stated in Finding V, R. 22, 23), and this assessment and taxation were made, in all respects, according to the laws of California (as stated in Finding III).

2. That no question can be here raised about the assessment not being made upon, and after sufficient notice and opportunity to be heard, and after actual hearing had. Finding VIII (R. 23) expressly finds that, by the Consti-

tution and laws of California, the right to be heard in relation to assessments is granted—that before, and at the time of making the assessment in the present case, defendant had full legal notice thereof, and appeared before the Board of Equalization, and had full hearing of the matter of making the assessment.

3. That all railroads owned and operated in more than one county of California, whether owned by corporations or individuals, were and are assessed in the *same* manner as the railroad, etc., of defendant (as found in Finding IX, R. 23) was assessed and taxed in the present case.

4. That the present assessment and taxation were for the fiscal year beginning July 1, 1885, and ending June 30, 1886 (Finding V, R. 22), and the tax sued for was imposed only upon the franchise, roadway, roadbed, rails, and rolling stock of the defendant, and did not include or tax *any* property of the defendant which was not exclusively used in connection with the operation of said railroad as such.

These propositions just stated being observed, it results that all questions hitherto discussed in such cases as *California* vs. *Central Pacific et al., supra, Santa Clara R. R. Tax Case*, 9 Sawyer, 159, (1) in regard to its being illegal for the States to tax Government franchises, (2) in regard to taxing lands and other property not used for railroad purposes differently from other property of the State not used for railroad purposes, (3) and the tax not being imposed in a way to make it due process of law, owing to the absence of all opportunity to be heard, (4) and about there being other railroads in California, extending into several counties, *not* owned by corporations, and which were taxed differently from defendant's property, are entirely removed from consideration in the present case. We, therefore, turn to a consideration of the first question named above, and which is still involved in this important controversy between California and her railroad corporations.

In its simplest form, this principal question, brought by the present writ to this Court for its determination, is, whether railroad property held, owned, and used for railroad purposes, and extending into more than one county, may, without violating any constitutional provision, be, by the Legislature of the State, classed by itself for the purposes of taxation, and assessed and taxed differently from the other great masses of property of the State; this either because of the special and valuable franchises bestowed upon such railroad corporations, or because of the nature of the property and of its uses; or because of the special detriments and inconveniences to other citizens and their property which the construction and use of the railroads may occasion; or because of the nature of its mortgage obligations and of the places where these, as a rule, are owned and held; or because of the *unity* wrought by the nature, objects, and use of such properties so held and operated; or because of the fact that the great body of such property cannot have assigned to it a particular *situs* for purposes of assessment and taxation; or because of any other consideration which the Legislature may deem sufficient to justify its separate and special classification and taxation.

Stating more briefly, and repeating this question involved in the present case, it is, whether the State, in fixing the basis of assessment and taxation of the property of such railroads, may *increase or diminish the assessment on account of the use to which such properties are, by these corporations, put.*

If the statement of the main question here involved, which has just been made, is a fair one, we do not, we confess, see why, in entering upon the consideration of the question and the citation of authorities, we may not properly begin by citing the authority of the case on which our adversaries have uniformly relied, ever since its existence, in resisting the present tax.

Our proposition is that the Legislature may look to the *uses* to which property is put and the character of the ownership for the purpose of either increasing or diminishing the basis of assessment and taxation.

In the opinion by Justice Field, in the *Santa Clara Tax Case*, 9 Sawyer, 199, it is admitted that "such classification may be made from inherent differences in the nature of the different parcels of property, and also of the different uses to which the same property may be applied."

On pages 188 and 189, the opinion states:

"Undoubtedly since the adoption of the fourteenth amendment, the power to exempt is much more restricted than before, but that it may be extended to property *used for objects of a public nature is not questioned;* that is, where the property is used for the promotion of public well being, not for a private end. Thus property used for public instruction, for schools, colleges, universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the State for the tax which would otherwise be exacted. If buildings, used as churches for public worship, are also sometimes exempted, it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws."

Now notice the logical effect, upon the argument, of this distinct holding by the Court.

1. Nothing found in the fourteenth amendment *expressly* gives any such right to exempt public institutions supposed to contribute to the public welfare; and, therefore, if it is given at all, it is by mere *implication.* Its provisions are broad, sweeping, and without *any expressed* exception, to wit:

"Nor shall any State deprive *any person* of life, liberty, or property without due process of law, or deny to *any person* within its jurisdiction the equal protection of the laws."

The prohibition is against denying to "*any person.*"

2. Note (what we shall hereafter more fully see) that

every dollar of exemption in favor of "any person," whether owning a school, or a church, or a college, is not only a *lessening* of the burdens of that person, but is, in an exact mathematical ratio, an *increase* of the burdens of all other taxpayers.

3. Therefore, if this exemption of one and increased burden upon another, can, by implication, be found to be *tolerated* by the fourteenth amendment, and by the other provisions of the Federal Constitution, then so may any *other* exemption in favor of one and correspondingly increased burden against the others, be found to be so tolerated, if the Legislature of the State should decide that such other exemption and correspondingly increased burden is for the public welfare.

4. Observe that we are now considering the Federal Constitution, as distinguished from Section 1, Article XIII, of the State Constitution, requiring the taxation to be in proportion to value. With the effect of this Section 1, Article XIII, we now have nothing to do, that being a *State* question and not within the purposes of the present inquiry.

5. And if an exemption of one, and a correspondingly increased burden upon others, can, by implication, be found as permitted by the Federal Constitution, then, by a logical sequence which is irresistible, if not self-evident, so can an *increased* basis of taxation be adopted by the Legislature as against railroads. This can be by the Legislatures done for reasons approved by the Legislatures, such as the increased burdens caused to the State and the people, and the increased profits allowed to be withdrawn from the people. These and other considerations of which the Legislatures are *alone* judge, and the Courts never, can be made the occasion for increased basis of assessment—this proposition being the exact converse of those above quoted from Justice Field (9 Sawyer, 189). He gives, as a reason for exempting schools, colleges, universities, churches, and

the like, the fact that these institutions result in such public benefits as make them "the equivalent, to the State, for the taxes which would otherwise be exacted."

Surely the principle here asserted involves the correlative power, in the Legislature, of *adding* to the assessment for taxation where the nature of the property or nature of its uses, or both, add to the burdens of the people in the way of tolls, injuries to homes, to lands, to public roads, lessening the safety of travel, and the like extraordinary burdens.

We now turn to a review of some of the cases and some of the principles of law which show that the present tax is not in conflict with any provision of the Federal Constitution, but is, on the other hand, justified by the practices of the States ever since, as well as before the adoption of the fourteenth amendment.

It cannot be denied, because this Court has repeatedly ruled it, that although the fourteenth amendment is, in words, a prohibition against the States, yet as to this equality clause it is equally a prohibition against Congress, and that Congress cannot enact tax laws which deny to the people equal protection of the laws. (See *Sinking Fund Cases*, 99 U. S. 718, 719, and other cases cited below.)

On the question of the power of Congress to pass laws exempting *some* property, owing to the nature of its uses, from taxation, and to thus, and thereby, *increase the burdens of others*, in *Gibbons* vs. *District of Columbia*, 116 U. S. 404, this Court has spoken authoritatively.

In Section 8 of the Act for the government of the District of Columbia, approved March 3, 1875 (18 Stats. 503), the following property was exempted from taxation: Houses used for reform, almshouses, buildings devoted to art or charity, church buildings and grounds occupied by buildings, houses used to improve the condition of seamen and soldiers, public library buildings, cemeteries, the lands

appurtenant to such buildings. Then in Section 8 of the Act, approved March 3, 1877, for the support of the District of Columbia (19 Stats. 399), the following property is exempted: Corcoran Art building, free public library buildings, churches, soldiers' home and grounds, houses used for reformation, almshouses, institutions of public charity, cemeteries, etc.

It will be seen in said *Case of Gibbons*, 116 U. S., p. 407, that these statutes were attacked on the ground, amongst others, that they were unequal in that they provided for a tax of $1 25 per $100 on the lands in the District *outside* of Washington and Georgetown, and held solely for agricultural purposes, and yet, on all other property, real and personal, in the District (not exempt), imposed a tax of $1 50 per $100. The claim was, that this was an exceedingly unequal tax. The Court rejected this contention, and held what the last paragraph in the head note states thus:

"It is within the constitutional power of Congress, acting as the local Legislature of the District of Columbia, to tax different classes of property within the District at different rates."

The language of the Court upon this subject is at the end of the opinion (top page 408), opinion by Gray, J., where it states:

"In the exercise of this power Congress, *like any State Legislature*, unrestricted by constitutional provisions, may, *at its discretion*, wholly exempt certain classes of property from taxation, *or may tax them at a* LOWER *rate than other property*."

We proceed further to examine some of the cases, and the principles of law which relate to the character, extent, and results, as bearing upon the present inquiry, of what is commonly denominated, in tax cases, the State's "power of classification" of property for purposes of assessment for taxation.

And upon this matter we first submit that unless it can be maintained that the fourteenth article of amendment has destroyed it, the State, in the exercise of its sovereign power, has the right not only to tax according to its discretion, but also to classify property for assessment and taxation.

What the State may do in that behalf has been stated by this Court as follows, in *The Railroad Company* vs. *Peniston*, 18 Wall. 5.

At page 29 the Court says:

"That the taxing power of a State is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument, and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal Government, either expressly or by necessary implication, are propositions that have often been asserted by this Court. And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that, before the adoption of the Constitution of the United States, each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction, alike by taxes on polls or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the Constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost or duty on imports or exports, except what may be absolutely necessary for executing the State's inspection laws. As was said in *Lane County* vs. *Oregon:* 'In respect to property, business, and persons within their respective limits, the power of taxation of the States remained, and remains entire, notwithstanding the Constitution. It is, indeed, a concurrent power (concurrent with that of the General Government), and in the case of a tax upon the same subject by both Governments, the claim of the United States as the supreme authority must be preferred; but, with this qualification, it is absolute. The *extent* to which it shall be *exercised*, the

subjects upon which it shall be *exercised*, and the *mode* in which it shall be *exercised*, are all equally within the *discretion* of the *Legislatures to which the States commit the exercise of the power*. That *discretion* is restrained only by the will of the people expressed in the State Constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress.' Such are the opinions we have expressed heretofore, and we adhere to them now."

See also, to the same effect, *Williams* vs. *Supervisors*, 122 U. S., pp. 163, 164.

In the light of this opinion, the sovereign and absolute power of a State to impose taxes, and to determine the extent, the subjects upon, and the mode in which it shall be exercised, cannot be disputed. If the right to classify ever could have been the subject of reasonable disputation, it has been set at rest by the decision of this Court in the *Kentucky Railroad Tax Cases*, 115 U. S. 321, in which this very question was presented, and, at page 337, disposed of in these words:

" But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the *discretion* of the legislative power, and there is nothing to forbid the *classification of property for purposes of taxation* and the *valuation of different classes by different methods*. The rule of equality, in respect to the subject, only requires the *same means and methods to be applied impartially to all the constituents of each class*, so that the law shall operate *equally* and *uniformly* upon *all persons in similar circumstances*. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the *value* of their property is ascertained. The different *nature* and *uses* of their property *justify the discrimination* in this respect which the *discretion* of the Legislature has seen fit to impose.

"So, the fact that the Legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots in such a sense as imperatively to require the employment of the same machinery and methods for all in the process of valuation for purposes of taxation."

The Constitution of New Jersey declares that property shall be assessed under general laws by uniform rules.

In the case recently decided in that State of *Board of Assessors* vs. *Railroad Company*, 48 N. J. Law, 164, the highest Court of the State held (reversing the Court below) that the New Jersey Act of April 10, 1884, which provides *special* machinery for the taxation of railroad and canal property and franchises, and further provides a *special* mode of valuation by a State Board of Assessors, is neither repugnant to the aforesaid provision of the New Jersey Constitution nor to the fourteenth amendment of the Federal Constitution.

In the case of *County of Mobile* vs. *Kimball*, 102 U. S. 691, 703, the objection to a certain State law as unconstitutional was raised. One ground of objection urged was that it fastens upon *one* county the expense of an improvement for the benefit of the *whole State*. In rejecting this contention asserting the invalidity of the statute as one imposing unequal taxes and burdens, the Court says:

"When any public work is authorized it rests upon the Legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray the expense shall be raised. It may apportion the burden ratably among all the counties, or other particular divisions of the State, specially or commonly benefited by the expenditure.

"It may be that the Act imposing upon the county of Mobile the *entire* burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the Legislature had apportioned the expenses of the improvement, which was to benefit the *whole* State, among all its citizens. But this Court is not the harbor in which the people of a city or county can find a refuge for ill-advised, unequal, and oppressive State legislation. The judicial power of the

Federal Government can only be invoked when *some right under the Constitution, laws, or treaties of the United States is invaded.* In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a *change of their representatives.* They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

And see cases cited 120 U.S. R. 355

Most clearly this is a holding that the fourteenth amendment did not prohibit the unjust and unequal taxation. It will be seen hereafter, in other cases cited, that this language of Justice Field about the fullness and finality of the State's power, etc., to classify, is, in its substance, taken from the language of Chief Justice Marshall in other cases.

In the case, from California, of *Hagar* vs. *Reclamation District No. 108*, 111 U. S. 701, a similar question came up, and the opinion was by Field, J. In that case, page 704, a rule is stated which, though not bearing upon the point now under consideration, regarding classification, may be brought up in the present case in attacking the present tax assessment, on the ground that it violates the provision of Section 1, Article XIII, of the State Constitution, requiring the property to be *taxed according to value.*

In reply to a point made in the case, alleging a conflict between the State Constitution and the statute in question, this Court, in said *Hagar Case*, *supra*, says (page 407):

"Of the several objections to the validity of the assessment urged in the Court below, and now pressed here, some arise under local statutes *not involving any question of Federal law;* and some under the laws and Constitution of the United States. The former relate to the manner in which the reclamation district was formed, it being established by Supervisors of one county, while part of the lands were situate in another county; to the fact that appellant derived his title to the lands under the grant from the Mexican Government; and to the requirement that the amount assessed should be collected in gold and silver coin of the United States."

In reply to this contention, based on State laws, the Court says:

"*There being no Federal question touching these matters, we follow the decision of the State tribunals as to the construction and validity of the statutes.*"

It was also, in this case, contended that the legislation in question was invalid because of taxing one portion of the community for the benefit of others not taxed. The Court rejects this contention, reaffirms the law laid down in *Mobile* vs. *Kimball*, *supra*, and as laid down in *Louisiana* vs. *Pillsbury*, 105 U. S. 295, and sustained the tax.

To the same general effect is the case of—

Wortz vs. *Hogeland*, 114 U. S. 606.

In the case of *Seminary* vs. *Commissioners*, 147 Mass. 427, decided 1888, a law (to wit: Federal Stats., C. II, Sec. 5, Ch. 3) which exempted from taxation the personal property of literary, benevolent, charitable, and scientific institutions incorporated within the State of Massachusetts, was held to be constitutional, both under the Massachusetts Constitution, requiring taxes to be "reasonable and proportional," and under the fourteenth amendment to the Constitution of the United States. And this was so held although a certain accumulated fund in question was by the decision totally exempt from taxation, and, of course, correspondingly increased burdens thrown upon the other people.

So in the case of *Northampton* vs. *Commissioners*, decided 1887, reported in 145 Mass. 108, the Supreme Court held that exact equality of taxation was impracticable (see p. 110, citing, to the same effect, 118 Mass. 389); also held that *a party asserting the unconstitutionality of a law must make it out beyond reasonable doubt* (p. 109); and also held that a law of Massachusetts, the validity of which was brought in question (of 1849, C. 96), and which, in effect, prevented certain funds from being taxed as other such personal

Federal Government can only be invoked when *some right under the Constitution, laws, or treaties of the United States is invaded.* In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a *change of their representatives.* They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

And see cases cited 120 U.S. R. 305

Most clearly this is a holding that the fourteenth amendment did not prohibit the unjust and unequal taxation. It will be seen hereafter, in other cases cited, that this language of Justice Field about the fullness and finality of the State's power, etc., to classify, is, in its substance, taken from the language of Chief Justice Marshall in other cases.

In the case, from California, of *Hagar* vs. *Reclamation District No. 108*, 111 U. S. 701, a similar question came up, and the opinion was by Field, J. In that case, page 704, a rule is stated which, though not bearing upon the point now under consideration, regarding classification, may be brought up in the present case in attacking the present tax assessment, on the ground that it violates the provision of Section 1, Article XIII, of the State Constitution, requiring the property to be *taxed according to value.*

In reply to a point made in the case, alleging a conflict between the State Constitution and the statute in question, this Court, in said *Hagar Case*, *supra*, says (page 407):

"Of the several objections to the validity of the assessment urged in the Court below, and now pressed here, some arise under local statutes *not involving any question of Federal law;* and some under the laws and Constitution of the United States. The former relate to the manner in which the reclamation district was formed, it being established by Supervisors of one county, while part of the lands were situate in another county; to the fact that appellant derived his title to the lands under the grant from the Mexican Government; and to the requirement that the amount assessed should be collected in gold and silver coin of the United States."

In reply to this contention, based on State laws, the Court says:

"*There being no Federal question touching these matters, we follow the decision of the State tribunals as to the construction and validity of the statutes.*"

It was also, in this case, contended that the legislation in question was invalid because of taxing one portion of the community for the benefit of others not taxed. The Court rejects this contention, reaffirms the law laid down in *Mobile* vs. *Kimball*, *supra*, and as laid down in *Louisiana* vs. *Pillsbury*, 105 U. S. 295, and sustained the tax.

To the same general effect is the case of—

Wortz vs. *Hogeland*, 114 U. S. 606.

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property was taxed, to wit: at the place where situate, and such law allowed only one eighth of such fund to be so taxed at the place where it was situate, was valid and constitutional, both as to the provisions of the Massachusetts Constitution and as to the fourteenth amendment to the Constitution of the United States.

There are many other cases to which we will below come, to the same general effect.

(See also State Railroad Tax Cases, 92 U. S. 611.)

It being, as we contend, settled that the State may divide property into classes for the purposes of taxation—may make farming lands to be of one class, city and town lots of one class, and railroads, their franchises, roadway, etc., another class—it necessarily follows that if the State of California has made such a division or classification, she has not exceeded her general sovereign authority by so doing, the fourteenth amendment being now thrown out of view.

And it equally follows from this that the State must be the judge, and the *sole* judge, as to what classification shall be made within the limit of the power to classify. It can only become subject to legal criticism when what is done, or provided for, operates *unequally* upon different persons belonging to the *same class*. (*Missouri* vs. *Lewis*, 101 U. S. 22.)

Now, what the State has done in this case, and all that it has done, is to designate classes—the franchise, roadway, roadbed, rails, and rolling stock, are designated as a class, and farm lands, etc., as another class—and to provide methods and rules for the assessment of these respective classes. An analysis of the provisions of the Constitution and laws of California shows this clearly.

Article XIII of the Constitution of the State deals with "property" alone, and not with persons or owners of

property. We are aware that it has been argued heretofore, and doubtless will be again, that this article deals with persons, the basis of which contention will be presently considered. Section 1 provides that all "property" shall be taxed in proportion to its value. It then declares what the word "property" shall embrace. Section 4 provides that a mortgage, etc., shall be deemed to be an *interest* in the "property," and proceeds to provide how that property shall be assessed, to wit: the value in excess of the mortgage shall be assessed to the owner, and the "interest in the property," as represented by the mortgage, to the holder of the mortgage. It then excludes from this class of property the property (franchise, roadbed, roadway, rails, and rolling stock) held by railroad companies; and in Section 10 provides for assessing such property in its entirety to the company.

It cannot, therefore, be said that in these provisions persons are being dealt with, or that this has any relation to classification of persons, or makes any discrimination as to persons, unless that can be extracted from the following language, viz.:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other quasi public corporations."

We have, for the purposes of this discussion, punctuated this as it is claimed it should be punctuated.

Let it be so punctuated, and what is its plain meaning? It is that a "mortgage," etc., shall be deemed and treated as an interest in the property affected thereby, except as to the property of railroad and other quasi public corporations.

What precedes and what follows shows that this is the meaning; that it is "property" and not "persons" that is being dealt with, and that "property" is here classified—

i. e., property owned by railroads and other quasi public corporations is embraced in one class, and property not held by such corporations in another class.

This, then, is the mere description of classes of property.

After providing thus for the classification of "property," in Section 10 provision is distinctly made for assessing these classes.

The section is here again inserted for convenience, to wit:

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Language cannot make it plainer that these sections classify "property," and provide for assessing, in one class, property not owned by railroads, in the doing of which mortgages are to be deemed an interest in the property, and so assessed, and the value in excess of the mortgage is to be deemed an interest in the same property, and so assessed; and in another class "property" *owned* by railroad companies, as to which no such division is to be made. It is a distinct classification of "property," and not a classification of persons.

The entire theory of the defendant's case, as we learn it from trial of like cases, is that there is discrimination, because *deductions* are made as to individuals, and not made as to specified corporations. But we submit that this contention is not justified by the language of the Constitution.

Section 4 of Article XIII first declares that a mortgage shall be deemed to be an interest in the property affected

thereby. Then, having divided the property between the two owners—the mortgagor, and mortgagee, at the line marked by the difference between the value of the whole and the amount of the mortgage—it proceeds, secondly, to direct that these separate interests shall be separately assessed.

It is a misnomer to call this a deduction from the interest of the owner of the property. It is simply an ascertainment of the amount of actual property *each* has, and an assessment of each accordingly. But it is urged that the result is the same, because no such division is made in case of railroad property; and, therefore, there is unequal discrimination.

The railroad property is not taxed beyond its value, but it is not divided as property between the mortgagor (the company) and the mortgagee (the bondholder), and each taxed separately for his interest. Or, to state it yet differently, the mortgage in this case is *not* declared to be an interest in the railroad property, and the assessment is against the owner as to the entire value.

Is this an *unlawful* discrimination?

The answer to this question, we submit, is found in the principles of law which control the powers and rights of sovereign States to classify the property within the State for purposes of taxation, and which we insist are not invaded or modified by the fourteenth amendment so far as affects the case at bar.

In the consideration of the question, what is the extent and nature of this sovereign right of classification of property for taxation, we desire to guard against misapprehension by stating the limitations upon this sovereign power.

And we state that this power of "classification" is not one that is unlimited, and, by the judiciary, non-reviewable, in the sense that under the cover of the power of "classification" arbitrary and despotic power can be exer-

cised, such as is violative of the fundamental principles of free government.

For example, under this power to classify and to tax the Legislature has no right to adopt a system of taxation which is purely arbitrary. This is so because "*apportionment*" is of the very definition of taxation. Nor can the Legislature impose taxes for private as distinguished from public purposes. (Cooley, Const. Lim. 175; *Stuart* vs. *Palmer*, 74 N. Y. 189.)

Hence, a classification for taxation which classified property belonging to males and that belonging to females separately, and imposed all the taxes upon the property of the females, would be no "classification" at all within the sense of that word in tax systems; and would be void as violative of the fundamental principles of all constitutional government. (20 Blatch. 342.) So a tax imposed for the purpose of bestowing its proceeds upon the private fortunes of individuals would be void for the same reason. The invalidity of such pretended classification would not arise from its being violative of the fourteenth amendment alone, or specifically, or in particular, but would be because it involves an attempt to exercise power outside of the prerogatives of Governments like ours.

Precisely this has been held by this Court in a multitude of cases, and conspicuously in *Wilkinson* vs. *Leland*, 2 Pet. 657, 658; *Terrett* vs. *Taylor*, 9 Cr. 43; *Von Hoffman* vs. *Quincy*, 4 Wall. 550; *Sinking Fund Cases*, 99 U. S. R. 719.

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What is meant, therefore, to be designated by and included in this sovereign and unfettered power, discretion, and right of choice, which is held by every State in making "classification" of property for taxation, is not the power to disregard the fundamental principles of free government

and of private property rights; but this power does mean that the Legislature, in making classification and imposing taxes, is (aside from limitations in the State Constitution) subject to *no other* restraints, in the exercise of these high discretions, than those limitations which make the boundaries of the legislative power in every constitutional government—such limitations, for example, as that property shall not be taken without due process of law; that one man's property shall not be taken to be bestowed upon another man; that the ends of taxation shall be public and not private; that the apportionment of taxation shall not be arbitrary merely, and the like.

Or, stated in another way, this sovereign power of classification for taxation is one whose boundaries are such (to here adopt the words of Chief Justice Marshall, in *McCullough* vs. *Maryland*, 4 Wheat. 428) that "the security against abuse of the power is found in the *structure* of the Government itself."

Stated in still another form, the limitation upon this power to classify and tax (here again adopting the language of Chief Justice Marshall, in *McCullough* vs. *Maryland*) may be stated thus, that the power of taxation "may be legitimately exercised on the objects to which it is applicable to the unlimited extent to which the Government may choose to carry it." In *Bank* vs. *Billings*, 4 Pet. 561, the same Chief Justice says this vital power may be abused, but "the interest, the wisdom, and the justice of the representative body, and its relations with its constituents, furnish the *only* security against unjust and excessive taxation, as well as against unwise taxation."

And this Court, through the same eminent Chief Justice, repeats the doctrine of the unlimited nature of this power, where he says, "it is *unfit* for the judicial department to inquire what degree of taxation is legitimate or wise, and what may amount to an abuse of the power." (*McCullough* vs. *Maryland*, 4 Wheat. 430.)

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The plain result of the proposition which we have now stated so fully, to wit: that the State's power and right of choice, in making "classifications" for taxation, is (aside from restraints in the State Constitution) bounded only by the limitations which restrain the powers of legislation in every free Government, is this one, namely, that the "classification" of railroad property for taxation by itself, and without the right of deducting mortgage debts, is not in excess of legitimate "classification" for taxation, unless so to classify and tax is such a flagrant usurpation and injustice as make it violative of the fundamental principles of *property right* as protected by all free Governments.

Now, is the law of California, which the defense in the present case assails, of this flagrantly unjust character, or, on the other hand, is this discrimination complained of sanctioned by reason and justice?

We shall see that this assailed discrimination is most manifestly founded in the highest considerations of justice.

In entering upon the considerations which show this, it is essential to fix in the argument a proposition somewhat preliminary to our present position, that this discrimination complained of is no unequal discrimination, and is essentially just.

The preliminary point is this, to wit: that the criticism directed against this discrimination is founded in an utter mistake of *fact*. The criticism asserts that this discrimination against railroad property is an attempt to deprive "persons" who become members of a railroad corporation of the equal protection of the law, by taxing them, merely because they *are such members*, enormously in excess of other citizens. This is the prominent, indeed the "stock" objection to the legislation here assailed.

Stated in another way, the criticism is one which asserts that the American citizen is, by these laws, treated as a kind of outlaw; treated as one to be despoiled at the mere

caprice of the Legislature, and this *solely* because he has entered, with his property, one of these railroad corporations.

The mistake is in the assumption that these tax laws regard and deal with the *natural persons*, and their separate and private property, which make up these corporations, in their *natural and individual, as distinguished from their associated and artificial, character and capacity*, and that the Legislature, in the very nature of the subject-matter, cannot, in imposing these taxes, regard the property invested in the corporations as in any other legal predicament or *status* than is an equivalent amount of similar property held by individuals as natural persons.

Now, it is palpable that the very opposite of this is the truth.

When the citizen enters such a corporation he does so with the purpose of obtaining, from his Government, for himself and his corporate property, very high and valuable powers, rights, immunities, privileges, and franchises which are *never held by the mere private citizen*. He asks to be endowed with some of the very highest attributes of governmental sovereignty, and some of the most valuable franchises which originally belonged exclusively to sovereign States. In asking these, he does it with full knowledge in advance that the laws of his State, and indeed of all modern civilized States, impose corresponding obligations and contributions to the Government in return for these most valuable franchises so sought and bestowed.

On entering such corporation he asks that he may be allowed to impose tolls upon all who use these highways of the State—highways made under the exercise of the right of eminent domain—and he gets this right to levy the tolls.

He asks that he may be exempt from the laws of the State which, as against a private citizen, prohibit common labor on the Sabbath day. And he claims from the State

the right to labor and take tolls on three hundred and sixty-five days in each year. He asks from the State the right to demand (what is not accorded to private travel) that all other lines of commerce shall afford to him and to his line all reasonable connections, exchanges, and facilities for business, and he receives these enforced privileges, which are not accorded to any others of the people. He demands from the State the right, without your leave and against your protest, to cut in twain your farm or the curtilage of your house, and from the State he gets the right accorded to none others of the people. He demands from the State the right to destroy your home, to penetrate the heart of your cities, to occupy with his highway your highways, and to render all these unsafe, uncomfortable, and unwholesome, and he gets from the State the right to do all these—rights accorded to none other of the citizens.

It is needless to go on with this catalogue of supremely important franchises and privileges so accorded to these railroad corporations, and denied to all other citizens.

What we have stated is ample for the purpose of showing that it is a mistake to say that property so endowed with such exceptional powers, rights, and franchises, so derived from the State, must be classified for purposes of taxation precisely like all other property of the people, which holds, and is connected with, not one of these valuable franchises which are connected with and affect, with increased values, every particle of railroad property.

In brief, these corporations possess in connection with their holdings a species of property intangible, but of immense value, specially granted to them by legislative enactment, known as "franchises," which individuals do not have in respect to their holdings. It carries with it advantages of succession, perpetuity, etc., not enjoyed by individuals. It is the very life of these artificial persons.

They have the right of eminent domain; they have the

privileges and immunities of common carriers; they come into being to conduct a special business intimately associated with the trade and commerce of the country, and the property they hold other than the franchise is only an incident to, or an instrumentality used as a means of making useful, this intangible yet most important part of their property, the "franchise." This franchise is inseparable from its ties, rails, etc., and it is impossible, certainly impracticable, to separate the one from the other in reaching its value; yet the fact that they were assessed together is one of the complaints made in this case. What it has in the shape of property [redacted] associated with it and inseparable from it that most valuable element, the "franchise;" franchise and roadbed and rails, and so on, go to make up the property of this artificial person. And thus it is made necessary to group them all together for the purpose of assessment; and other property, having no such element, and no such condition, justly occupies a place as a distinct class.

Again: The State in the exercise of its sovereign power could not do otherwise than make this a distinctive class without doing one of two things, viz.:

It must tax its citizens to the full value of the property held by them, respectively, irrespective of mortgages; or it must permit to escape (owing to the notorious fact that these railroad mortgages are, as a rule, owned by parties not living in the State) taxation all railroad property embraced in franchise, roadbed, etc., that is mortgaged to its full value.

Such property of a railroad company, it cannot be denied, should be subjected to a tax, but it could not be liable to a tax upon the principle of making a division, such as is provided for, above referred to, because the holdings of the bonds secured render the collection of such a tax, if so assessed, impracticable, indeed impossible. These bonds

are sold and held all over the world, as is shown by the history of such railroad bonds the world over, and are in this respect unlike all private mortgages. And so the alternative was presented either to oppress the citizen by imposing a tax on property that he only in part owned, or dividing property held under such dissimilar conditions into classes in their nature and constituent elements wholly distinct, and thereby making subject to taxation, property, which it in large part created by granting the franchise, and which without such classification would escape taxation.

Who can say that such an exercise of sovereign power was not wise?

Who can say that such a division or classification works injustice?

Who can justly say that property, thus brought into being, can be relieved from all taxation because it has been mortgaged to its full value, unless citizens whose property is the result of their own endeavors, and in no part the gift of the sovereign, shall also be taxed to the full value, regardless of incumbrances?

Yet the contention of the defendant is, in effect, that the property of an individual having none of these qualities, having had no grant of a franchise, no right of eminent domain, none of the many incidents and advantages enjoyed by a corporation, standing in a position entirely different from that of a corporation, and his property being different in its characteristics and elements, must be treated exactly like that of a corporation, in respect to taxation; or rather that whatever the State may do for its citizens, in their individual capacity, as such, in relation to the taxation of their property, precisely the same thing must be done as to the property of these corporations; and the failure to treat these essentially different classes of property held by these two classes of persons in precisely the same way is an unlawful discrimination.

The contention of the defendant is, it seems to us, most conclusively answered by the Court in the—

State Railroad Tax Cases, 92 U. S. 575.
Society for Savings vs. *Coite*, 6 Wall. 607.
State Freight Tax Cases, 15 Wall. 232.
State Tax on Gross Receipts, 15 Wall. 284.

HOW DOES THE FOURTEENTH AMENDMENT AFFECT THIS CASE?

That the classification that was made by the State is one that it could lawfully make if the fourteenth amendment had not been adopted must, we think, in the light of the authorities, be conceded, and therefore the next question is, has that amendment destroyed that right to thus classify?

We insist that that amendment has no relation, such as defendant claims, to this power of the State to impose taxes; that it does not *enlarge* the *restrictions* upon the State, which we have above stated.

Let it be carefully remembered, throughout the consideration of the present point, that our contention is not that property held by corporations is not entitled to all constitutional protection to which other property is entitled; but our contention is that, being so entitled to all the protection secured by the Constitution to the property of natural persons, yet neither corporation property, nor the property of natural persons, is, by the fourteenth amendment, or any other constitutional provision, protected against the power and right of the State to "classify" property for purposes of taxation; that in making this classification for taxation and for exemption, the State is not *confined* to any one iron rule on which it is bound to base classification, as for example, shall allow all debts to be deducted from value of *all* taxable property. That, on the other hand, in making classification, the Constitutions of the States and the laws of the States may base the classification, either in whole or in

part, upon either the *value* of the property taxed, or upon the *nature* or usefulness, to the State, of the property taxed, or upon the nature of the business taxed, or upon the value and nature of the franchises held in connection with the property taxed, or upon the usefulness, to the State, of the profession or business of the persons taxed, or upon the condition of helplessness, or inability to pay, or the opposite, of the persons to be taxed or exempted from taxation.

In short, this power of classification, held by the State, has (aside from limitation created by the State Constitution) no other limitation than the sovereign pleasure of the State, exercised, however, under the restraints which limit the powers of all constitutional governments, such as that property shall not be taken without due process of law, and the like.

What led to the adoption of this amendment, and what it was intended to accomplish, its "pervading spirit," never can be more forcibly stated than in the language of this Court in the *Slaughter-house Cases*, 16 Wall. The substance of that "pervading spirit," as there declared by the Court, is to confer citizenship on the negro race, just released from bondage, and to prohibit hostile discrimination against that race; and that this amendment might be safely trusted to prohibit such slavery as Mexican peonage or Chinese coolie labor, and that "in any fair and just construction" of any phrase or section of the amendments this "pervading spirit" must be looked to, and then the Court uses this language:

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws. In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied

by this clause, and by it such laws are forbidden. If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discriminating against the negroes as a class, or on account of their race, *will* EVER *be held to come within the purview of this provision. It is so clearly a provision for that race, and that emergency, that a* STRONG CASE *would be necessary for its application to* ANY OTHER."

This is repeated, emphasized, and enlarged upon in the case of *Strouder* vs. *West Virginia*, 100 U. S. 306.

It is again repeated in *Ex Parte Virginia*, 100 U. S. 344.

And that this Court would not permit this amendment to be strained beyond this "pervading spirit" is shown by the decision in the case of *Elk* vs. *Wilkins*, 112 U. S. 94.

This amendment was analyzed by Mr. Justice Wood, in the *Insurance Company* vs. *The City of New Orleans*, 1 Wood, 87. He distinctly held that a corporation is *not a "citizen" or "person," within the meaning of the fourteenth article of amendment.*

We quote from page 88:

"Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word "person," where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and, consequently, natural and not artificial persons. This construction of the section is strengthened by the history of the submission by Congress, and the adoption by the States of the fourteenth amendment, so fresh in all minds as to need no rehearsal."

But in the *Santa Clara Case*, 118 U. S. 396, "before argument," the Chief Justice said:

"The Court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

And in the case of *Philadelphia Fire Association* vs. *New York*, 119 U. S. 121, Mr. Justice Harlan in his dissenting opinion quotes the remark of the Chief Justice above, and then deals with the subject under consideration upon the assumption that it is settled that corporations are "persons" in contemplation of that provision of the fourteenth article which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.

Whilst we hardly feel justified in asking the Court to reconsider the question whether the word "persons" in the fourteenth amendment includes corporations, we yet have inserted the quotation from the Slaughter-house opinion, and other like utterances, because of the bearing these utterances have upon the general scope, spirit, and purpose of that amendment.

Now, assuming that this amendment *does* embrace corporations, the question still remains whether they are to be considered as standing precisely on the same footing as natural persons. They are endowed with some qualities that a natural person cannot have, and they cannot be endowed with some qualities possessed by natural persons. They cannot hold office, nor vote, nor sit on juries, and the like, and the withholding of these privileges could not be depriving them of "the equal protection of the laws," although these are conferred upon all other "persons."

And therefore, even if they are persons, they are only persons *of their own class*, and as such are entitled only to have all *of that class* treated alike when the conditions are

the same, or to be treated the same as natural persons when the conditions are the same.

Nothing could have been farther from the minds of the makers of that amendment than the thought that it was in any way to interfere with the power of a State to regulate, after its own methods and according to its own discretion, the assessment and collection of taxes.

But it is contended now by this defendant that this language is so elastic that it can be stretched over all the affairs of corporations, and control the State in the exercise of its right of taxation as to such corporations.

We have already seen by the adjudications of this Court how supreme and absolute is the power of a State as to taxation.

That was a known and thoroughly recognized right, a right indispensable to its existence, a right which cannot be hampered or trammeled, except by the clearest prohibition by its only superior, the Constitution of the United States. And we most respectfully submit that the language well known to have been intended to subserve one especial and great purpose, cannot, without violence, be used *to strike down a sovereign right of a State*, in its greatest and immemorial powers.

Certainly such right of the State would not be held to be trespassed upon by the Constitution of the United States without the clearest provision. No doubtful or uncertain language could have that effect, and this is especially so in the matter now under consideration, because it is a right of such supreme importance, and because of the express reservation in favor of the States of all power not expressly delegated. (*Montclair* vs. *Ramsdell*, 107 U. S. R. 147; also 4 Dall. 14, 6 Cr. 87, 19 Wall. 666.)

There has been no utterance of this Court that we have seen that qualifies or casts any doubt upon *this* declaration in the Slaughter-house cases, viz.: "that a strong case

would be necessary for its application to any other," *i. e.*, than the protection of the negro race.

Now, is this such a case?

If it is conceded that corporations are persons within the fourteenth amendment, it must, on the other hand, also be conceded that they are not so in *all* legal respects; and we insist that they are not so in the sense and to the extent that the State has been deprived of its power to classify their property for taxation according to their own sovereign will.

But to the position now stated, that the tax upon defendant's property is vindicated by the inherent and sovereign right of the State to classify property and to tax it according to its class, the reply is made that this power to classify is, in California, subject to the other constitutional rule, that it matters not what classification may be adopted, each and every class and item must be taxed under one and the *same* rule of assessment, to wit: that it "shall be taxed in proportion to its value, to be ascertained as provided by law;" that in the case at bar no complaint is made as to the per cent or *rate* of taxation, as there is no difference in the *rate* assessed against defendant and others, nor is the complaint that defendant's property is classed by itself; but the complaint is that "a different rule is followed in ascertaining the value of the property of railroad corporations, as a basis for taxation, from that followed in ascertaining the value of property held by natural persons. In estimating the value, in one case, certain elements are considered by which the value, as a basis of taxation, is *lessened;* in estimating the value, in another case, those elements are omitted by which the valuation is proportionally *increased*" (9 Sawyer, 199, 200); that "classification" of property, for taxation, must be based upon the "difference in the *nature* of the different parcels of property," or on "the different uses to which it

is applied" (9 Sawyer, 199); that, under this power of classification, based on the nature and uses of property, school property, church property, and other property not held for private gain, may be classified as exempt, because of the benefits done to the State, without violating the fourteenth article of amendment (9 Sawyer, 189); but that all this does not justify the present tax, because it taxes *all* the property of the railroads by this radically different and more burdensome rule of assessment, including such as its farms and other lands not at all connected, in point of use, with the railroad, and this although these lands differ in no respect from the lands of the people generally, except in the fact that one is owned by a railroad and the other is not.

This, it is asserted, is no legitimate "*classification*" and more than it would be to classify all legitimate property owned by *white* persons as exempt, and that owned by *colored* persons as alone taxable.

This is, in its substance, a strong statement by Mr. Justice Field, in *Santa Clara Case*, of the whole argument against this tax, so far as based on the allegation of denial of equal protection. It is, in substance, the same argument which, in different views, we have already considered. But we here restate it, in the shape just repeated, not only because it brings into view objections to what we have said regarding the vindication of this tax on the ground of the sovereign power of the Legislature to classify property and to tax according to the class, but also because it is the strongest statement of the case for the defense which we have seen.

Now, an analysis of this statement of the defense shows that it includes in it the following elements:

First—That owing to the prohibition in the fourteenth article against denying equal protection, no State can extend or deny to any owner or class of owners of property,

held for private purposes, any exemption on account of the ability, or lack of ability, of the owner to pay, or on account of the wants or condition of his family, or on *any* account which relates to the condition of the *owner*, which is not extended to all owners of private property.

Second—That in exercising its sovereign right of discretion and choice, regarding the subject, method, and rules of taxation, no State of the Union, since the adoption of the fourteenth amendment, holds any power to regard or treat any railroad property, not actually used in operating the road, as being, for the purposes of taxation, "*affected*" by the supremely-valuable franchises and powers bestowed, by the State, upon such railroads.

Third—That although the States may, notwithstanding the fourteenth amendment, exempt from taxation all property held by private owners for the purposes of education, religion, or charity, this because the benefits which these do to the State may be received as equivalent to the taxes remitted, yet the State may not deny to railroads any exemption from taxation on account of the enormously valuable franchises, rights, privileges, and immunities which these derive, by gift, from the State; nor yet on account of the exceptional burdens, damages, etc., which these roads inflict upon the State and its citizens.

The second of these three propositions, derived from the opinion in 9 Sawyer, has no application to the present case, because this case involves no property of defendant except such as is used in its railroad business.

In passing, it is proper to state that this *Santa Clara Case*, 9 Sawyer, 165, is, at least, *doubted* in a decision made by Newman, J., in 1887, in the case of *Singer Manufacturing Co.* vs. *Wright*, decided in the Circuit Court of the United States for the Northern District of Georgia, and reported in 33 Federal Reporter, 125.

That each of these three propositions is in conflict with

reason, the practices of all these States, and with authority, seems to be exceedingly plain.

If it indeed be so that the fourteenth amendment has rendered it unlawful for the Legislature to make discriminations on account of the *condition or the ability or the usefulness of the taxpayer*, or if that amendment has left it lawful to exempt property which *lightens* the burdens of government, owing to its nature and use, such, for example, as property used for schools, for religion, and for charity, and yet at the same time renders it unlawful for the Government to *increase* the taxes upon corporations whose business and whose endowments, by the State, have greatly increased the burdens, the expenses, and the discomforts of the Government and its citizens, and whose emoluments have been enormously increased by reason of the franchises bestowed by the States—then, indeed, has this fourteenth amendment wrought an invasion of the powers and autonomy of the States which was not dreamed of by its makers; it has brought about a revolution in the systems and principles of taxation which strikes down some of the most salutary and long-continued practices of the States, and has taken from these States powers of taxation which have been conceded to them by the unanimous consent of authority and reason.

Take, for example, the matter of the right and the propriety of the Legislature, looking to the *condition* of the taxpayer, in determining upon his taxation and his exemptions.

The position just quoted from 9 Sawyer is one which says that the fourteenth amendment has abolished the right to impose different taxes upon the same kind of property owing to the difference in the condition of the owner of the property. Can it be possible the fourteenth amendment has this effect? To illustrate: All the States of this Union have deemed it wise and lawful to exempt

heads of families, of *limited means*, from great varieties of taxation, such as poll taxes, income taxes, taxes on household goods, and the like, and yet to impose these taxes upon the more opulent, or upon those having no families to support. It is alleged that the fourteenth amendment has rendered this unlawful. All States have found it wise to encourage the immigration of skilled artisans, artificers, manufacturers, and the like, by securing to them exemption from certain classes of taxation which the State has found necessary to impose upon the majority of the people. Now it is alleged that the fourteenth amendment has rendered this also unlawful. All States have found it wise to encourage the profession of teachers in literature and the useful arts and in religion; and have, accordingly, exempted these from certain taxes which are imposed upon the majority of the people. This discrimination in favor of teachers and professors and ministers of religion, it is alleged, is now rendered unlawful by this fourteenth amendment. The States have found it wise to assess against certain very lucrative pursuits and professions exceptional taxes, and have therefore subjected the profession of the law, and many other exceptionally lucrative pursuits, to taxation not imposed upon other pursuits.

This, too, it is alleged, the fourteenth amendment has rendered unlawful. Most, if not all, new States have found it wise to exempt from taxation the newcomers settling in such States for a period of time, this on account of the hardships incident to the beginning of life in new places. All this is rendered unlawful by this fourteenth amendment. All States have found it essential to exempt from certain taxes persons who are in exceptionally dependent or helpless or necessitous conditions, such as the poor, having not exceeding a designated amount of property, widows having dependent upon them for support children, and the like. Now this exemption is declared to be rendered unlawful by the fourteenth amendment.

All States which have granted to any of its citizens specially valuable monopolies or privileges, such as rights of wharfage, ferries, bridges, and the like, have found it wise to assess against the owners of these, special and heavy contributions, in the nature of taxes to the State. These taxes are alleged to be prohibited by the fourteenth amendment.

But, especially above and beyond all other examples and illustrations, we now state that illustration which is the very case now at the bar of this Court, namely, that every State of this Union, and, indeed, every other modern civilized State, has deemed it wise and just to apply to that class of artificial persons called "corporations," which ask and receive from the State those supremely valuable franchises with which great moneyed corporations are endowed—such as the right to impose tolls upon the people, the right to take private property without the consent of the owner, the right to occupy and interrupt the highways of the State, the right to do, and to exact from its employés, common labor on the Sabbath day, the right to enjoy legal immortality, the right, in case of banks, to make, issue, and enjoy the profits of, the money of the State—special and exceptional rules of taxation. Hence, in every State, so far as we have examined, these moneyed corporations have been taxed upon exceptional and special systems of taxation.

Now, it is alleged that all this is also rendered unlawful by the fourteenth amendment.

These are examples of the consequences which are to result from holding that the fourteenth amendment prohibits all discriminations, in taxation, based wholly or mainly on the character or condition of the owner of the property.

We have said that the position just quoted from 9 Sawyer, denying to the States the power to base their classification for taxation, in whole or in part, upon either the condition of the ownership, or upon the privileges and fran-

chises bestowed, by the State, upon the owner, or upon the nature of the use of the property and its profitableness, or upon any other rational grounds which the Legislature might select, is a position not supported by authority or by the practices of the States.

The general rule upon this subject is thus stated in Cooley on Taxation, 145: "The general right to make exemptions is involved in the right to apportion taxes, and *must be understood to exist wherever it is not forbidden.*"

It must, of course, be here kept carefully in mind that this Court, in determining whether the Constitution of California violates the fourteenth amendment, is dealing *alone* with the Federal question.

As to the alleged conflict of the tenth section of Article XIII with the first section of that article, and with the law under which this tax was assessed, we shall not, in this brief, deal with that, because, in the first place, we deem that point sufficiently disposed of in such rulings of this Court (and they are innumerable) as we have above quoted from *Hagar's Case*, *supra*, 111 U. S. 704; and because, also, if that question is to be discussed we shall leave that wholly to the Attorney-General.

The real question touching the present point is whether, when the Constitution and laws of California tax the defendant's property, as was done in the present case, they have violated the provision of the fourteenth amendment securing equal protection. And that question, whether said taxation, as assessed in this case, is not "equal protection," remits us to that fundamental and ultimate question whether, according to the powers and practices of modern States, it is so radically unjust and unequal to tax railroad property by a system different from that applied to private citizens, as that the discrimination violates the fundamental rights of property, and the fundamental principles of all free Governments.

It is to this question that the discussion must always come back. It is the Constitution of California that is here on trial, and it is not some supposed conflict of the statutes of California with the Constitution of California. On *this* conflict this Court will follow the Supreme Court of California. The question, on the contrary, is whether the Constitution of California, together with the statute thereunder, in taxing this railroad property as they do, violates the provision of the fourteenth article, which simply secures to the people of the State equal protection. And whether the tax assessed in this case violates the rule of equal protection must be decided or at least *influenced* by ascertaining whether our States have, or have not, held and exercised that power of classification and taxation which was applied, in the present case, to the property of the defendant.

If, for example, the Court should find that the Constitution and laws of the States of this Union have, hitherto, made, and do now make, such discriminations in their tax system as is here complained of, and if the Court should find that, to give to the fourteenth amendment the construction here insisted upon by the defendant, would be to strike down many of the most important parts of the Constitutions and laws of the States of this Union, then this Court will not give the fourteenth amendment such an interpretation, unless compelled by the plain text of the Constitution.

Reduced to its last analysis, the position taken here by the defendant, as we understand it, and as it *must* be, that the clause in the fourteenth amendment, securing equal protection, is one which *forbids* taxation of railroad property in a class by itself, and upon a mode of assessment different from that applied to natural persons, is a clause which inserts in the Constitution of every State of this Union a prohibition restraining the State Legislatures from making just such classifications of property, for taxation,

as have been made during the entire history of these States, and compels the Legislature to adhere to one fixed iron rule in taxing all property according to value, and this without regard to the dissimilarity of the subjects of taxation, or of dissimilarity in the matters of the condition of the ownership thereof, the special emoluments, profits, and privileges enjoyed by such ownership, and regardless of all other differences in the condition of the property and of its ownership.

How radical will be the revolution which the insertion of such a provision in the Constitutions of the States would be, becomes apparent by a glance at the tax systems of the States, and at the kind of exemptions and distinctions which have been and are now tolerated by such tax systems.

Of course it is impracticable, and besides would be improper, to insert in this brief an extended examination of the Constitutions and laws of the States, which would be stricken down if the fourteenth amendment should receive the construction insisted upon.

The existence of the exemptions from taxation, and the discriminations in modes of assessment for taxation, which we have enumerated above, as things that would be rendered unlawful by the defendant's interpretation of the "equal protection" clause of the fourteenth amendment, are so universal, so conspicuous, and so important, as embodied in the Constitutions and laws of the States, that this Court, and all Courts, will, where these features of tax systems become material, take judicial notice of them.

The fact is, that if the equal protection clause of the fourteenth amendment has rendered it unlawful to insert in the Constitutions and laws of the States discriminations based upon the nature of the franchises and privileges held by the taxpayer, or upon the nature of his business, or upon his ability to pay taxes, or upon the nature of his profession or pursuit, then this amendment has radically invaded the

tax systems of all the States of the Union, and has deprived the States of some of the most valuable and indispensable elements of their sovereignty.

It being the cardinal principle of that part of the defense which relies on the "equal protection" feature of the fourteenth amendment, that no classification is lawful, under that amendment, which denies exemptions to one class of owners which it extends to another class, or which applies a special system of taxation to one class of owners which is different from that applied to the body of the people, or which bases taxation or exemption upon the *special* character of the business, or of the property, or of the franchises enjoyed, or of the ownership, it manifestly follows that such constitutional provisions and laws as we name below can no longer either be enacted or exist, in the States, under our present Constitution.

We select at random some specimen laws which have received judicial sanction as valid laws, and which must perish if this position of the defense is sustained by this Court.

Section 3 of Article XII of the Constitution of Ohio prohibits *deduction* of debts from the "dues" owned by banks in listing them for taxation. But as to private persons, no such prohibition is in the Constitution. Section 2 of the General Tax Law of fifth of April, 1859, allows individuals to deduct *bona fide* debts from their "dues" in listing for taxation. This must perish upon the theory of the defense.

In *Commonwealth* vs. *Bank*, 5 Allen, 428, a tax which was held to be a purely franchise tax of one half per cent, assessed on the deposits in savings banks, was held valid. This tax, imposed on the principle of taxing in proportion to the value of franchise and business, must be abolished under defendant's theory of the effect of this fourteenth amendment.

Illinois Central R. R. Co. vs. *McLean*, 17 Ill. 291, held

valid a tax in the form of a part of the earning of the road, in lieu of all other taxes. But if the fourteenth amendment prohibits a basing of taxation upon the nature of the franchise enjoyed and the amount of business done, then this law of Illinois is void.

In *Savings Bank* vs. *Rochester*, 37 N. Y. 366, 367, a statute of twenty-third of April, 1886, which declared the privileges and franchises granted by the Legislature to savings banks to be personal property, and which taxes them as such, was held valid. But since the defendant's interpretation of the fourteenth amendment renders void all taxes based, in whole or in part, on the value of the franchises enjoyed, therefore this law of New York is also void.

In *R. R. Co.* vs. *Dennes*, 116 U. S. R. 665, this Court recognized and treated as valid an Act of Louisiana of twenty-eighth of April, 1853, which excepted from taxation the capital stock and all the property of a railroad company for *ten years* after completion. This law must be held void under defendant's interpretation of the fourteenth amendment, because the exemption is based on the nature and condition of the property owner, and upon its not being ten years old.

In *Tennessee* vs. *Whetworth*, 117 U. S. R. 229, and in another case between the same parties, 117 U. S. R. 140, the Court recognized, and treated as valid, similar exemptions of railroad property by the laws of Tennessee, the exemptions being based on the nature of the franchise held and the newness of the enterprise. These laws are invalid under the defendant's interpretation of the fourteenth amendment, because their discrimination is based solely on the condition and nature of the party exempted from taxation.

In *Ruggles* vs. *Kimball*, 12 Mass. 337, and in *Gridley* vs. *Clark*, 2 Pick. 403, the Supreme Court held the laws of Massachusetts of 1811 and 1821, exempting ministers of

the gospel and professors in colleges from taxation on account of their occupation, to be valid.

According to the theory of the defense all such laws must now be held void because prohibited by the fourteenth amendment.

In *Boody* vs. *Watson*, 63 N. H. 320, the statute was held valid which authorized towns to exempt manufacturing property from taxation for a term not exceeding ten (10) years.

Under defendant's interpretation of the fourteenth amendment this law of New Hampshire is void, because it bases an exemption upon the nature of the taxpayers' business and his youthfulness in that business.

In *Ramsey County* vs. *Ry. Co.*, 33 Minn. 537, the Supreme Court recognized as valid the statute of Minnesota of 1878, Chapter II, Sections 128 and 129, which provided that if the railroad paid a certain percentage of its gross earnings to the State, then the road and all other property, estate, and effects of said corporation, held or used for, in, or about the construction, equipment, renewal, repair, maintaining, or operating its road, including *the lands granted* to the company to aid in the construction of said road, should be exempt from taxation. Here, again, the exemption is based upon the condition of the owner and the nature of the business, and this law must perish under defendant's interpretation of the fourteenth amendment.

In *Railway* vs. *R. R. Commissioners*, 112 U. S. R., this Court recognized as valid the twenty-eighth section of the Act of the State of Arkansas of the eleventh of January, 1853, which exempted from taxation the capital stock of the company until the road should pay a dividend of six (6) per cent, and exempted the road itself and its other property for twenty (20) years from completion. This statute is void by defendant's interpretation of the fourteenth amendment, since it bases the exemption on the youthful condition of the enterprise, etc.

In *Gaslight Co.* vs. *Brooklyn*, 89 N. Y. 409, the Court held the law of New York of 1880, Chapter DXLII, Clause 3, which exempted manufacturing corporations from certain taxes, to be valid. This Act is overthrown by defendant's interpretation of the fourteenth amendment, because it bases taxation and exemption upon the usefulness of the taxpayer's business.

The opinion of the Court in *Welles* vs. *Railroad Co.*, 14 Blatchford, 426, 428, and 429, contains a rather striking presentation of the precise points which we have last considered. It is a case where the petition for an injunction restraining the collection of taxes was based upon the proposition that the face of the law, under which the taxes were assessed, showed that it gave to a certain railroad a ten years' exemption of its property from taxation, whilst the *same sort* of property of complainant was not so exempt; and by reason of said exemption complainant's taxes were *increased;* and, hence, it was asserted that the law was unequal, unconstitutional, and void. The Court, in rejecting this contention, strongly states the unlimited and unassailable nature of the discretions, held by every Legislature, to make these classifications and discriminations in taxation. It enumerates amongst the discriminations and exemptions, so made by Legislatures, the following: Unimproved lands; lands improved less than two years; exemption from poll taxes until a certain age is attained; exemption of cattle, horses, sheep, and swine up to a certain age, etc. After making this enumeration, the Court adds these words:

"And the Legislature has frequently, in its discretion, for the sake of encouragement to laudable enterprise, made particular exemptions, important in character, when considered in connection with the tax-paying property left—like the exemption of the whole township of Wheelock from all public taxes (*Morgan* vs. *Cree*, 26 Vt. 773); the exemption of the Vermont Central Railroad from taxation (*Vt. C. R. R. Co.* vs. *Burlington*, 28 Vt. 193); the exemp-

tion of certain persons (*Wheeler* vs. *Lane*, 15 Vt. 26), and many others of like character. The right to make these exemptions has stood *unchallenged* until the present case, and the want of it is *not consistent with the idea of the sovereignty that belongs to a State*. So firmly settled is the power of the Legislature of a State to make exemptions from taxation, that, when a franchise is granted by a Legislature free from taxation, it is not within the power of it to afterwards withdraw the exemption by repealing the law that created it, or by any other legislation. (*Gordon* vs. *Appeal Tax Court*, 3 How. 133; *State Bank of Ohio* vs. *Knoop*, 16 How. 369; *Vt. C. R. R. Co.* vs. *Burlington*, 28 Vt. 193.) The power to make such exemptions, unless restrained by constitutional provisions, must rest with the Legislature of every State, *to be exercised in its own discretion*. As is said in the opinion of the Court, in *State Bank of Ohio* vs. *Knoop*, by Justice McLean, 'the taxing power may select its objects of taxation. * * * Now, the exemption of property from taxation is a question of *policy*, and not of *power*.'"

Now, this case is a statement of each one of the propositions which we have been considering.

It is an assertion of our main proposition, that the limitation upon the powers of a State Legislature to make classification for purposes of taxation is (aside from limitations contained in the State Constitution) only to be found in those fundamental limitations imposed upon the power of all free Governments which protect private property—this doctrine being asserted, by this Court, in the words above quoted, to wit: "Now, the exemption of property from taxation is a question of *policy*, and not of *power*." (16 How. 384.)

It (*Welles* vs. *Railway Company*, 14 Blatchford, 428, 429) is a strong assertion of the power of every sovereign State to base discriminations in taxation and exemptions upon the conditions and character of the taxpayer, or upon the character of his pursuits or profession, or upon his utility to the State, or upon the burdens he imposes upon the State or the people, or upon the value of the franchises he derives from the State, or the like.

It is an assertion of our other proposition, that discriminations in taxation, or in exemptions therefrom, which are based on such considerations, is not violative of the rule that requires taxation to be "apportioned," and not to be arbitrarily assessed upon a few, regardless of all considerations of justice.

It would be useless to extend these examples. They have been given for the purposes of illustration, and for the purpose of indicating the startling consequences which must follow the interpretation of the fourteenth amendment, upon which the defendant insists.

The interpretation of the "equal protection" clause of this fourteenth amendment, which so invades the most vital elements of the sovereignty of the States, and which must work an overthrow of a large proportion of their laws, will not be lightly adopted by this Court.

But to this position of ours—alleging, in substance, that railroad corporations may be denied this right of deducting mortgages, in listing their property for taxation, which is accorded by the Constitution to other citizens, without this being a violation of the "equal protection" clause of the fourteenth amendment, because of the peculiar nature and the peculiar value of their *franchises* and the resulting peculiar emoluments, etc., bestowed by the Government upon these railroad corporations—reply is made which appears in the briefs of the railroads in cases analogous to this, and is found, as well stated as it is anywhere, in the opinion of Justice Sawyer, in the *Santa Clara Railroad Tax Case*, 9 Sawyer, 240 *et seq.* This reply is somewhat specious, but is, we submit, unsound.

Its substance is this:

It is said by the railroads that the denial to them of the right to *deduct* mortgages cannot be defended as being in the nature of a tax on their *franchises*, because, by Section 1, Article XIII of the Constitution, "all property" is required

to be taxed "in proportion to its value," and franchises are there declared to be "property;" that hence, in legal contemplation, these railroad "franchises" are appraised, listed, and taxed, by the Board, at their full value, but distinct from the other and the tangible property of the railroad corporation; that, hence, the State having *already* taxed the franchise, distinctively and in effect separately from other property, at its full value, it therefore becomes, and is, a denial of "the equal protection of the law" for the State to deny to the railroad company said right of deduction of mortgages; this on the score of the company's having received said franchises, *so already appraised and taxed at their full value.*

Judge Sawyer expresses this idea at the conclusion of his remarks on this point (9 Sawyer, 241), in these words:

> "*Their franchises* have, therefore, already been otherwise assessed at their value—all the Constitution will allow—and this discrimination is not, and cannot be, under the Constitution of California, a franchise tax."

Now, whilst this position may be regarded as somewhat specious, it yet seems to us that the suggestion of a few considerations makes plain its unsoundness.

Observe, therefore, first, that the thing here on trial is not some statute of California for a violation of the State Constitution. On the contrary, the thing on trial is that part of the Constitution of the State which *accords* to the citizens generally said right of deduction of mortgages, whilst it *denies* the deduction to railroads. This denial is alleged to violate the "equal protection" clause of the fourteenth amendment. Therefore, the question is whether the constitutional clause, which *separates* railroads from other taxpayers and taxes them, as it does in Section 10, Article XIII, by treating their property as a unit, including in that unit "the *franchise*, roadway, roadbed, rails, and rolling stock," and assessing these "at their actual

value," and in depriving them, in Section 4, of the right to deduct mortgages, is, because of said denial of said right of deduction, a denial of equal protection.

It is alleged to be such a denial, because of said fact that said *franchise* has already been made to bear a full and, in effect, separate tax upon its full value, as required by said Section 1, Article XIII; and, therefore, to impose upon the owner of said franchise said denial of said right of deduction, on account of said ownership of said franchise, which has, as aforesaid, already paid its tax in full, is unjust and a denial of "equal protection." The palpable error of this whole reply is in the assumption of said fact of the *separate* appraisal, assessment, and taxation of said franchise at its full value.

Tangible property is, usually, perhaps universally, capable of separate appraisal and taxation, viewed independently of any system of laws. This is never possible as to these railroad company franchises. It is a legal impossibility to deal with them, appraise them, or tax them, considered as an integer, and separated from the provisions of the law which creates them, and which assesses them and taxes them as an inseparable part of the unit called "the corporate property." This is not only self-evident, but is often enforced by the decisions of this Court, as for example, in *State Railroad Tax Cases*, where the Court says:

> "By virtue of this privilege or franchise this (body of railroad property) *is all aggregated into a unit*, well adapted to make money by its use in that way, with a chartered right to use it for that purpose." (92 U. S. R.)

We have already quoted from this and other cases what abundantly shows that a corporate franchise is, for the purposes of appraisal, assessment, and taxation, never treated, and cannot be treated, as a *separate* unit, divorced from the other corporate property by the laws which create it, and which, as a whole, determine its value.

Therefore, it is an utter mistake to say that these corporate franchises have been *separately or specially* assessed at their value, and as such taxed.

They are, on the contrary, assessed and taxed precisely as Section 10 says, to wit: along with "roadway, roadbed, rails, and rolling stock." Therefore, in appraising this railroad property as a unit, to wit: "the franchise, roadway, roadbed, rails, and rolling stock," the Courts must regard the State Board as having *done its duty* in making the appraisal of this property, and that such Board must have recognized the fact that the value of that property, including said franchise, *is affected and lessened* by the fact that the said Constitution *denies to this property the right to make deduction of mortgages.* Therefore, it is an utterly false assumption to assume that these franchises have once paid their taxes upon a valuation made upon the theory that they, *like other citizens, have said right of deduction.*

Other citizens' property is assessed for taxation and its value *increased*, in contemplation of law, owing to their said right to make said deduction. Railroad property, on the other hand, is assessed upon the opposite hypothesis, to wit: the hypothesis that it *cannot* make said deduction; and, therefore, in contemplation of law, the valuation of *this* railroad property, for taxation, is correspondingly *diminished*, and the taxation therefore lessened.

Thus exact equality is worked out as to these two classifications of property as near as equality is possible in *tax* systems.

That equality in tax systems is practically *impossible.* See 104 U. S. 82; 145 Mass. 110; and 118 Mass. 306.

It is no reply to this to say that the Court below found, as a fact, that the Board made no deductions of mortgages in making this assessment.

Our reply does not proceed on the idea of any such deductions being made. On the contrary, it only says that, in

contemplation of law, *all* railroad property is valued and taxed *lower* than similar property of other citizens, *because* of the fact that the former are *not* entitled to said deductions, whilst the latter are so entitled.

The considerations now gone over at, we fear, too great length, seem to us to demonstrate the error of the Court below, and that its judgment must be reversed.

SAMUEL SHELLABARGER,
J. M. WILSON,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

No. 257

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs in Error,

vs.

THE SAN PABLO & TULARE RAILROAD COMPANY,
Defendant in Error.

BRIEF SUBMITTED BY MR. HARVEY S. BROWN OF COUNSEL FOR DEFENDANT IN ERROR.

Filed this ..... *day of* ..... *1893.*

..... *Clerk.*

By .....

Deputy Clerk.

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs in Error,

vs.

THE SAN PABLO & TULARE RAILROAD COMPANY,

Defendant in Error.

Brief submitted by Mr. HARVEY S. BROWN, of Counsel for Defendant in Error.

This was an action brought by the plaintiff to recover an alleged tax due from defendant to plaintiff. The Circuit Court rendered a judgment in favor of the defendant, and the case was brought by writ of error to this court.

The Complaint is as follows:

"Plaintiff avers that on the 15th day of August, in the year eighteen hundred and eighty-five, the State Board of Equalization assessed the franchise, roadway, roadbed, rails and rolling stock of the defendant at the sum of $900,000.00; that the Board apportioned the said assessment as follows: To the county of Alameda, the sum of $27,392.00; to the county of Contra Costa, the sum of $706,304.00; to the county of San Joaquin, the sum of $166,304.00.

"That the defendant is indebted to plaintiff for State and county taxes for the year eighteen hundred and eighty-five in the following sums: For State taxes, in the sum of $4,896.00; for county taxes of the county of Alameda, in the sum of $248.17; for county taxes of the county of Contra Costa, in the sum of $4,633.35; for county taxes of the county of San Joaquin, in the sum of $924.65, with five per cent added to each of said several sums for non-payment of taxes.

"Plaintiff demands judgment against defendant for said several sums, with five per cent added thereto, and costs and counsel fees, as allowed by law, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the Code of Civil Procedure. D. M. DELMAS,

Attorney for Plaintiff and the Controller."

In form it is precisely the same as the complaint in the case of the People of the State of California against the Central Pacific Railroad Company, reported in 83 California Reports, page 393. The form of complaint is prescribed in section 3670 of the Political Code of the State.

Findings four and seven are as follows (see Record, pages 22 and 23):

IV.

"That on the 2d day of September, 1878, the defendant was "indebted to divers persons, citizens of the United States, and "many of them then and now citizens and *bona fide* residents of "the State of California, in large sums of money advanced to con- "struct and equip the railroad of the defendant; that to secure "the payment of said indebtedness the defendant on said day exe- "cuted and delivered a mortgage on its said railroad, its fran- "chises, and all rolling stock and appurtenances; that said "indebtedness did then, and still does, exceed $3,000 per mile on "said road, and no part thereof except the accrued interest has ever "been paid, and the whole thereof is now, and since the execution "of said mortgage has been, a valid and subsisting indebtedness "against said company, and has been, and still is, secured by "said mortgage."

VII.

"That in making said assessment, the State Board of Equaliza- "tion, acting under and by virtue of the power conferred upon it "by the Constitution of the State of California, did not deem or "treat such mortgage as an interest in said property, but did "assess the whole value of said property to the defendant in the same "manner it would have done had there been no mortgage "thereon."

The Supreme Court of the State, in the case of the *People* vs. *The Central Pacific Railroad Company*, 83 Cal., page 393, held that the whole scheme for the collection of taxes, provided by the Political Code against railroads operated in more than one county, was unconstitutional and void.

The prevailing opinion in said case was as follows:

"This is an action brought in the name of the People of the "State to recover from the defendant a certain sum of money "alleged to be due the State for taxes, and also various other "sums of money alleged to be due to divers of the counties of "the State for taxes for the year 1886. The defendant demurred to "complaint, which demurrer was, upon argument, sustained by "the Court below, and judgment entered for the defendant, from "which the plaintiff appeals.

"So far as we are advised, this is the first case in which the "precise questions here involved, under the present Constitution, "has been presented for adjudication. To a complete under- "standing of it, we give the pleadings at some length. The "complaint, after giving the title of the court and cause, is as "follows:

"'Plaintiff avers that on the 14th day of August, in the year "'1886, the State Board of Equalization assessed the franchise, "'roadway, roadbed and rolling stock of the defendant at the sum "'of $20,000,000; that the Board apportioned the said assessment "'as follows: To the county of Alameda the sum of $2,607,230 "'[and here follows similar language as to sixteen other counties, "'differing only in amount]; that the defendant is indebted to "'plaintiff for State and county taxes for the year 1886 in the fol- "'lowing sums: For State taxes in the sum of $112,000; for "'county taxes of the county of Alameda in the sum of $16,225.34 "'[and here follows a statement in similar form as to the other "'sixteen counties before named, differing only as to amount]; "'with five per cent added to each of said several sums for non- "'payment of taxes.

"'Plaintiff demands judgment for said several sums, with five "' per cent added thereto, together with costs and counsel fees as "'allowed by law, and prays that an attachment may issue, in "'form as prescribed by section 540 of the Code of Civil Procedure.'

"To this complaint the defendant demurred on the following "grounds:

"'1. *That the Court has no jurisdiction of the subject-matter of "' the action, nor the person of the defendant herein.*

"'2. That the plaintiff has not the legal capacity to sue herein, "' for the following reasons: That sections 3668, 3669 and 3670 of "' the Political Code, under the provisions of which said action was "' instituted, are unconstitutional and void in this: that said sec- "' tions are in contravention of subdivisions 3 and 10 of section 25 "' of article IV of the Constitution of the State of California; they "' also are in contravention of section 21 of article I of the Consti- "' tution of the State of California, and of section 1 of article XII "' of the Constitution of the State of California; that said sections "' of the Political Code are in contravention of section 1 of the Four- "' teenth Amendment of the Constitution of the United States;

" ' that so far as the assessment of railroad property is concerned,
" ' sections 4 and 10 of article XIII of the State Constitution, upon
" ' which the said action is founded, are in contravention of section
" ' 1 of the Fourteenth Amendment of the Constitution of the
" ' United States.

" ' 3. That several causes of action have been improperly
" ' united.

" ' 4. That several causes of action have been improperly
" ' united, which are not separately stated in the complaint, that is
" ' to say: 1. A cause of action for State taxes; 2. A cause of
" ' action for county taxes of the county of Alameda [followed by
" ' a separate subdivision in similar form for each of the other six-
" ' teen counties].

" ' 5. *That the complaint does not state facts sufficient to constitute*
" ' *a cause of action.*

" ' 6. That the complaint is ambiguous, unintelligible, and
" ' uncertain in this: that it does not appear how or when defen-
" ' dant became indebted for taxes; that it does not appear how
" ' or when five per cent was added.

" ' WHEREFORE, defendant prays judgment against plaintiff, and
" ' that it may have its costs in this behalf expended.'

" 1. It will be unnecessary to consider these grounds of de-
" murrer separately at any considerable length. The questions of
" jurisdiction, of misjoinder of cause of action, of insufficiency of
" facts and of ambiguity, all turn upon the constitutionality of
" the provisions of the Political Code under which the plaintiff is
" attempting to proceed, and under which alone, if anywhere,
" this form of complaint can be justified. But, tested by the
" provisions of the Code of Civil Procedure, every point made
" against the complaint is well taken. Outside the Political Code
" of this State, it is doubtful if either authority or precedent can
" be found which would have induced any lawyer to file in a
" court of justice a complaint like this. *It does not contain 'a*
" *' statement of the facts constituting a cause of action,' as required*
" *by section 436 of the Code of Civil Procedure, or as required by*
" *any other rule of pleading known to the profession.* And yet,
" by section 421 of the same code—the general statute of this
" State devoted specially to the subject of pleadings and procedure
" in civil actions—it is expressly provided that 'the forms of
" ' pleading in civil actions, and the rules by which the suffi-
" ' ciency of the pleadings is to be determined, are those pre-
" ' scribed in this code.' And by the provisions of the Political
" Code, from which code it is conceded that this form of com-
" plaint is taken, it is expressly declared that 'the provisions of
" ' the four codes shall be treated as if passed at the same mo-
" ' ment of time, and were parts of the same Act,' and that 'if
" ' the provisions of any title conflict with or contravene the pro-

" ' visions of another title, the provisions of each title must " ' prevail as to all matters and questions arising out of the " ' subject-matter of such title' (Pol. Code, secs. 4480, 4481). " The sections of the Code of Civil Procedure referred to are " part of title 6, part II. The subject-matter of that title is plead- " ings in civil actions, and it is the only title in the four codes " devoted specially to that subject. It is, therefore, the title " which section 4481 of the Political Code declares '*must* pre- " ' vail as to all matters and questions arising out of that subject- " ' matter.' How, then, can we test the sufficiency of pleadings " by the provisions of section 3670 of the Political Code? That " section is the only warrant for this complaint, and is found in " title 9, part III—a title devoted entirely to the subject of " revenue.

" Responsive to this, the appellant says that the same Legis- " lature passed both codes; that its power to legislate is supreme, " except when and where limited by the Constitution; and that " its power is ample to prescribe one form of complaint for one " class of cases, and another form for another class. That is " true; but the same Legislature had the power to say, and did " say, that 'the forms of pleading in civil actions, and the rules " ' by which the sufficiency of the pleadings is to be determined, " ' are those prescribed by this *Act*,' to wit, the Code of Civil " Procedure, which is a separate Act from other codes, though " deemed to have been passed at the same moment of time; and " in the exercise of the same power, and at the same moment " of time, in another Act which defines the rights and duties of " all persons subject to the jurisdiction of the State, and a part " thereof devoted to a 'definition of the sources of the law,' and " a title of such part defining 'the effect of the codes,' it ex- " pressly tells the courts by what rule they shall be governed in " case the provisions of the four codes, or of either code, are " found to be conflicting.

" *Guided by that rule, when we examine this complaint we find* " *it defective in all these particulars:*

" 1. The defendant is sued by a name indicating that it is not a " natural person, but a company of some kind; but there is no " averment of the fact of incorporation, or of any fact to show " that it is an artificial being capable of being sued; nor if incor- " porated, is there any averment to show where, or under what " law, so that the Court may determine where jurisdiction of its " person lies. An averment of defendant's corporate existence is " necessary in every count of a complaint against a corporation. " (*Loup* vs. *C. S. R. R. Co.*, 63 Cal., 99.)

" 2. There is an averment of the fact of assessment of 'the " 'franchise, roadway, roadbed, rails and rolling stock of the " ' defendant,' but there is no averment that the defendant is

" the owner of such or any property, situate in this State or " elsewhere ; nothing to show that the property so assessed was or " is within the jurisdiction of the Board making the assessment, " or of this court, nor, indeed, that there was any such property " *in esse.*

" 3. There is an averment that the Board apportioned the said " assessment to seventeen different counties in the State, but there " is nothing to show its authority to make any such apportion- " ment ; that any portion of the property, or of any property of " defendant, was situate in any one of said counties. The appor- " tionment is of the total sum at which the assessment is made, " without a word of description of the property so assessed, or of " the part thereof so apportioned to any one of said counties.

" 4. There is an averment of indebtedness for State taxes, but " no averment that any taxes were ever levied or imposed upon " the defendant or its property ; or, if a levy was made, when, " where, or by whom it was made, or whether the taxes were " based or levied upon the assessment so made, or the property " so assessed as aforesaid, or that there are any State taxes against " the defendant delinquent or unpaid.

" 5. There is an averment of indebtedness for county taxes in " each of the seventeen counties named, but as to each the same " defect exists as above noted in reference to State taxes.

" 6. If there is any cause of action stated in this complaint at " all, there are eighteen separate and distinct causes of action, all " in one count, and not separately stated. They affect, and if the " money is collected it will belong to, eighteen different persons, " to wit, the State and seventeen separate counties. The only " provision in the title of the Code on the subject of pleadings " which authorizes the uniting of several causes of action in the " same complaint requires that they shall all belong to one class— " affect all the parties to the action, and must be separately stated. " (Code Civ. Proc., sec. 427.)

" 7. The complaint is also ambiguous, for the reason stated in " the sixth ground of demurrer.

" *Tax proceedings are in invitum, and to be valid must be stricti* " *juris.* (Cooley on Taxation, 259, 260; *Moss* vs. *Shear*, 25 Cal., " 46; 85 Am. Dec., 94; *People* vs. *Mahoney*, 55 Cal., 288; *Lake* " *County* vs. *S. B. Q. M. Co.*, 66 Cal., 20.) *If not valid, they* " *constitute no cause of action. It therefore becomes necessary that* " *a complaint in an action for the collection of a tax should show* " *upon its face facts sufficient to make out a prima facie case of valid* " *tax, and that it is delinquent.* It is true, that the title on revenue " provides that ' no assessment, or Act relating to assessment or col- " ' lection of taxes, is illegal on account of informality, nor because " ' the same was not completed within the time required by law.' " Pol. Code, sec. 3885.) But the waiving of informality does not

" waive the necessity for action. That an assessment shall not " be invalid because of some informality does not excuse the total " want of assessment. There can be no assessment unless there is " some property assessed, and, to be assessed, there must be some " attempt at description of the property. At least, its general " character must be shown, and its *situs* must be shown to " be within the State or the county where assessed. It " will be observed, also, that the section quoted refers to infor- " mality in the matters of assessment and collection only. The " statute nowhere waives informality in the matter of levy of the " tax. There is no tax until one is levied, and a complaint shows " no indebtedness for taxes unless it shows the levy of a tax. In " this complaint there is no intimation that a tax, either state or " county, was ever levied.

" Counsel for appellant has cited several decisions of this Court " in support of the power of the Legislature to prescribe by special " Act a special form of complaint in actions for the collection of " taxes. Unfortunately for his argument, those decisions were all " based upon special Acts passed at a time when the Legislature " had power to pass special laws upon almost any subject, and " even before the adoption of the codes; forgetting that here he is " attempting to proceed under the codes themselves, and that in " them the Legislature has itself provided for just such a contin- " gency as arises here, and directed us as to which shall prevail in " case of conflict between the different parts of the same general " law.

" II. But the respondent, by its demurrer, attacks this com- " plaint, and all the proceedings upon which it is based, upon other " and higher ground than that which we have thus far considered. " *The law upon which these proceedings are based is attacked as* " *being in conflict with the Constitution of the State.*

" The provisions of the Constitution on the subject of revenue " are all found in article XIII, and comprise the whole law of the " Constitution on the subject of the assessment of property for " purposes of taxation, and of the levy and collection of taxes. " Those provisions which bear most directly upon the questions " here involved are found in sections 10 and 13, which read as " follows :

" ' Section 10. All property, except as hereinafter in this section " ' provided, shall be assessed in the county, city, city and county, " ' town, township or district in which it is situated, in the manner " ' prescribed by law. The franchise, roadway, roadbed, rails and " ' rolling stock of all railroads operated in more than one county " ' in this State shall be assessed by the State Board of Equalization " ' at their actual value, and the same shall be apportioned to the " ' counties, cities and counties, cities, towns, townships and " ' districts in which such railroads are located, in proportion to

" the owner of such or any property, situate in this State or " elsewhere ; nothing to show that the property so assessed was or " is within the jurisdiction of the Board making the assessment, " or of this court, nor, indeed, that there was any such property " *in esse.*

" 3. There is an averment that the Board apportioned the said " assessment to seventeen different counties in the State, but there " is nothing to show its authority to make any such apportion- " ment ; that any portion of the property, or of any property of " defendant, was situate in any one of said counties. The appor- " tionment is of the total sum at which the assessment is made, " without a word of description of the property so assessed, or of " the part thereof so apportioned to any one of said counties.

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" II. But the respondent, by its demurrer, attacks this com- " plaint, and all the proceedings upon which it is based, upon other " and higher ground than that which we have thus far considered. " *The law upon which these proceedings are based is attacked as* " *being in conflict with the Constitution of the State.*

" The provisions of the Constitution on the subject of revenue " are all found in article XIII, and comprise the whole law of the " Constitution on the subject of the assessment of property for " purposes of taxation, and of the levy and collection of taxes. " Those provisions which bear most directly upon the questions " here involved are found in sections 10 and 13, which read as " follows :

" ' Section 10. All property, except as hereinafter in this section " ' provided, shall be assessed in the county, city, city and county, " ' town, township or district in which it is situated, in the manner " ' prescribed by law. The franchise, roadway, roadbed, rails and " ' rolling stock of all railroads operated in more than one county " ' in this State shall be assessed by the State Board of Equalization " ' at their actual value, and the same shall be apportioned to the " ' counties, cities and counties, cities, towns, townships and " ' districts in which such railroads are located, in proportion to

" 'the number of miles of railway laid in such counties, cities and " 'counties, cities, towns, townships and districts.'

" 'Section 13. The Legislature shall pass all laws necessary to " 'carry out the provisions of this article.'

" The last section quoted is the one to which we have to look " for authority to levy the tax. The first section of the article " commences by providing that 'all property in the State * * " ' * * shall be taxed in proportion to its value, to be ascertained " as provided by law;' and several subsequent sections speak of the " 'levy' and the 'taxes so levied,' and one says that 'income taxes " may be assessed to and collected from,' etc.; but nowhere in the " article is there any provision made as to when, or by whom, or in " what manner any property tax shall be levied. Provision for that " must be made by the Legislature under section 13, the last " section of the article. The same is true with reference to the " provision for the collection of property taxes. Both these " subjects are relegated entirely to the Legislature.

" We are therefore compelled to turn to the article of the " Constitution on the subject of the legislative department, to " ascertain whether or not there are any limitations upon the " mode and manner in which the Legislature may exercise the " powers and perform the duties imposed upon it by this section " 13, or as to the extent which it may go in the exercise of " those powers. These provisions are found in article IV of the " Constitution.

" Turning to section 25 of that article we find this provision: " ' *The Legislature shall not pass local or special laws in any of the* " ' *following enumerated cases*, that is to say:

" ' * * * * 3. *Regulating the practice of courts of justice,*

" ' * * * * 10. *For the assessment or collection of taxes;*

" ' * * * * 13. Extending the time for the collection of " 'taxes; * * * * 20. Exempting property from taxation;

" ' * * * * 24. Authorizing the creation, extension or " 'impairing of liens.'

" An examination of the whole section shows conclusively that " the intention of the framers of the Constitution, and of the people " in adopting it, was to prohibit the Legislature from passing local " or special laws which should in any wise affect questions of " taxation, or the liens of taxes, or the practice in courts of " justice. All these must be provided for by general and uniform " law.

" The Legislature has provided a general and uniform law 'regu- " lating the practice of courts of justice.' That law requires that " the complaint in a civil action shall be such as we have already " indicated, and that its sufficiency shall be determined as therein " prescribed. Yet in the teeth of this constitutional inhibition, " and in spite of the fact that the provisions of the Constitution

" are 'mandatory and prohibitory, unless by express words they " are declared to be otherwise' (art. I, sec. 22), the Legislature " has provided, 1. A general scheme for the assessment, levy, and " collection of taxes; and 2. A special scheme for the assessment, " levy, and collection of taxes on railroads situate in more than " one county, and in that special scheme has provided for the form " of complaint adopted in this action.

" The special scheme referred to is found in sections 3665 to " 3670 of the Political Code, the form of complaint being author- " ized by the latter section. The whole scheme, so far as it re- " lates to the collection of taxes, is claimed to be in conflict with " the Constitution, and in due course will be considered, but for " the moment we are dealing only with that part of it which " provides for this complaint.

" It is claimed by appellant that this is not in conflict with the " third subdivision of said section 25 of article IV, for that it re- " lates to pleading, and not to practice. But this is taking too " narrow a view of the language of the Constitution. It is evident " that the words of this inhibitory clause of the Constitution are " used in their general sense, and in that sense the words 'prac- " tice of courts of justice' include all 'pleadings,' although the " word 'pleadings' never includes all 'practice.' It is impossible " to contemplate the subject of 'practice of the courts of justice' " and eliminate from the mind all thought of 'pleading.' Burrill " defines 'practice' first, as 'the course of procedure in courts,' " and says that 'in a general sense practice includes "pleading."' " Rapalje & Lawrence's Law Dictionary gives the following " definition of the word 'practice:' 'The law of practice or pro- " 'cedure is that which regulates the formal steps in an action or " 'other judicial proceeding. It therefore deals with writs, sum- " 'monses, pleadings, affidavits, notices, motions, petitions, or- " 'ders, trials, judgments, appeals, costs and executions.'

" But it is further claimed by appellant that even if 'practice' " includes 'pleadings,' the provision is not in conflict with this " inhibition of the Constitution, for the reason that it is found in " the Political Code, which is a general law. It does not follow that " because an isolated provision is found in a general statute the pro- " vision is itself a general law. Such a provision may be purely 'spe- " cial' and come within the inhibition of the Constitution, even when " found in the Code itself. It was so held, with reference to a " section in the Political Code, in *Earle* vs. *Board of Education*, " 55 Cal., 489. In *Miller* vs. *Kister*, 68 Cal., 142, it was held " that a provision found in the general law entitled, 'An Act to " 'establish a uniform system of county and township govern- " 'ments,' temporarily suspending the operation of some of the " provisions of the Act as to four of the counties of the State, was " 'special' legislation, and void under the clause of the Consti-

" tution here under consideration. So it appears that a clause or " provision special in its character—applying to particular indi- " viduals, particular places, or particular cases—is none the less " 'special' because inserted in the most general of public Acts. A " special Act cannot be converted into a general Act by a declara- " tion of the Legislature that it shall be so considered. (*San* " *Francisco* vs. *S. V. W. W.* 48 Cal., 493.) Nor can it be so con- " verted by being embodied or entombed in an Act which in its " general scope and purpose is a general law. If it can be so con- " verted into a general law, then, as was said by the Court in *Dundee* " *M. T. I. Co.* vs. *School District No. 1*, 10 Saw., 52, 'every prohibi- " 'tion contained in the Constitution may be violated with im- " 'punity * * * An Act cannot be both public and private, " 'but it can be either and be "special."' In *Manning* vs. *Kippel*, " 9 Or., 367, it was held that an Act providing for the compensa- " tion of the Sheriffs and Clerks of fourteen out of twenty coun- " ties of the State was a 'local law' for the assessment and " collection of taxes for county purposes, and therefore within " this constitutional prohibition, and void.

" III. But the objection goes not alone to the form of com- " plaint, but to the entire legislative scheme for the collection of " taxes upon railroads operated in more than one county. It is " to the effect that the entire scheme is 'special,' and in conflict " with the different subdivisions of section 25, article IV, of the " Constitution, which we have quoted; and that being so in con- " flict, no action can be maintained thereunder for the collection " of taxes, whatever may be the form of the complaint.

" If this scheme is 'special,' then the cases which we have " already cited will apply to it in all its parts, and to them many " others might be added from the courts of last resort in very " many of the different States in the Union; but this Court has " already expressed itself so plainly upon the subjects in the cases " cited, that it is unnecessary to go elsewhere for authority.

" Practically admitting that the scheme is 'special,' the appel- " lant justifies it under section 13 of article XIII of the Constitu- " tion, above quoted, claiming that the Legislature is not only " authorized, but required, to pass all laws *necessary* to carry that " article into effect. That is true; but it is not authorized, re- " quired, or empowered to pass laws that are not necessary to " carry it into effect, nor to destroy the uniform operation of laws " which are required by the Constitution itself to have a uniform " operation.

" It will be borne in mind that the Constitution provides for a " difference in the mode of assessment only, not in the mode of " levy, or of collection of the tax on the property when assessed. " Under the Constitution, it became necessary, or, if not necessary, " at least proper, for the Legislature to pass laws providing the

" details for the assessment, and apportionment of the assess-
" ment, of this class of property by the State Board of Equaliza-
" tion. It is the only property in the State of which that Board
" is authorized by the Constitution to make assessment, and as
" the Board is only authorized to make such assessment when the
" property is situate in two or more counties, apportionment
" thereof to the several counties became necessary. To provide
" for the details of that apportionment, and of notice to the sev-
" eral counties interested, it became necessary and proper that the
" Legislature should act, and in so far as its action relates to the
" assessment, and the apportionment thereof, it is not attacked as
" being in conflict with the Constitution.

" But this legislation also provides a mode of collection differ-
" ing from that found in the general law on the subject; not nec-
" essary for the purpose of carrying into effect any of the
" provisions of article XIII of the Constitution, and 'special,'
" because not applicable to all property, or even to railroad prop-
" erty generally, but only to such railroad property as is situate
" or operated in two or more counties. For this reason it is in
" direct conflict with, and is specially forbidden by, subdivision
" 10 of section 25 of Article IV of the Constitution. It is there-
" fore void, and furnishes no cause of action upon which suit can
" be maintained under it.

" The provisions of the Code for the collection of taxes gen-
" erally, and those for the collection of taxes upon the portion of
" this class of property especially which lies in two or more coun-
" ties are too long to justify quotation in full in this opinion, but
" a reference to a few of the points of difference between them
" will serve to illustrate the 'special' character of the legislation
" against which this objection is pointed.

" Before calling attention to those differences, however, it is
" proper to note a few general provisions of the revenue law which
" are alike applicable to all persons and all property, and which
" serve to show a total absence of necessity for any difference in
" the mode of collection.

" 'Every tax has the effect of a judgment against the person,
" 'and every lien created by this title has the force and effect of
" 'an execution duly levied against all the property of the delin-
" 'quent; the judgment is not satisfied nor the lien removed until
" 'the taxes are paid or the property sold for the payment thereof'
" '(Pol. Code, sec. 3716). 'Every tax due upon personal
" 'property is a lien upon the real property of the owner thereof
" 'from and after 12 o'clock, M., of the first Monday in March in
" 'each year' (Pol. Code, sec. 3717). 'Every tax due upon real
" 'property is a lien against the property assessed, and every tax
" 'upon improvements upon real estate assessed to others than the
" 'owner of the real estate is a lien upon the land and improve-

" ' ments, which several liens attach as of the first Monday of " ' March in each year' (Pol. Code, sec. 3718). These provisions " apply to and these liens attach to the property of railroad com- " panies owning and operating roads situate in two or more " counties, the same as to all other property in the State. It will " thus be seen that, for the taxes upon this class of property, the " State and every county in it has the same security that is pro- " vided for taxes upon all other property in the State—a lien " upon all the property of the owner—not even excepting that " which is by law exempt from execution, and by other provi- " sions of the statute it is made a first lien ; so that, in no event, " can the State be defeated in the collection of its taxes, if its " own proceedings in the assessment, levy and collection have " been lawful.

" Under the general law the taxes upon all property, except " that here under consideration, are collected by the tax collector " of the county in which the property is situated ; the State as- " sumes the burden, the expense, and the risk of transporting its " portion of the taxes so collected from the respective county- " seats to the State treasury. Under this special law all the " taxes upon this class of property must be paid at the office of " the State Treasurer, after first getting a certificate of the Con- " troller as to the amount thereof. This includes not only the " State, but the county taxes for the several counties, thus im- " posing upon the taxpayer the burden, the expense and the " risk of transporting to the capital of the State moneys which, " in the aggregate, may be estimated by tons, as all taxes in this " State must be paid in coin.

" Under both laws, if the tax becomes delinquent five per cent " is added. Under the general law, on or before the first Monday " in February, the tax collector publishes in his county a de- " linquent list, which notifies the taxpayer of the amount of his " delinquency, and of the time when the lien will be enforced by " the sale of his property. Until that time he has the right to pay " the tax, with the five per cent for delinquency, and fifty cents " for the cost of publication of each separate description of real " property assessed to him, and upon each assessment of personal " property. If he does not pay it, the least amount of his prop- " erty which any bidder will take, and pay the tax and percen- " tage and costs will be sold, and he will thereafter have at least " one year in which to redeem the same. Under this special law " no notice of delinquency is ever published, but if the taxes due " remain unpaid until after the first Monday in February, the Con- " troller must then commence an action for the recovery of the " taxes due the State, and the various counties, and cities and " counties of the State, together with the said five per cent " penalty for delinquency, and the costs of suit; and it is specially

" provided that, whether the tax be then paid before or after judg-
" ment, the defendant shall also pay such counsel fees as the
" Court may allow. It is further provided that in such ac-
" tion the unverified complaint, in the form used in this case,
" shall be sufficient, and that, upon the filing of such complaint,
" the Clerk *must* issue the writ of attachment prayed for. It will
" thus be seen that, under this law, the taxpayer is not only
" burdened with heavy costs and expenses not provided for by the
" general law, but in addition to that, and notwithstanding the
" fact that the State has, as in all other cases, a first lien upon
" everything which he owns, any particular portion of this
" property which the representatives of the State may see fit to
" direct is liable to be summarily seized upon attachment, and, if
" it be personal property, taken out of his possession, held pending
" the suit, and finally sold under judgment for what it will bring.
" If there then be a deficiency, the original first lien still remains
" upon all the balance of his property. *The inequalities, and the*
" *possibilities of injustice, under such a provision, are certainly*
" *very great.* Take the case at bar ; the total amount sued for in
" this case, exclusive of costs and counsel fees, is $330,800.44.
" For this the State has a first lien upon the property, and most
" of it fixed property, assessed by itself at twenty million dollars.
" Notwithstanding that vast security, she asks for (and having
" asked, must have it) an attachment, under which her officers
" may direct the Sheriff to seize and take possession of all the
" rolling stock of the company, stopping its entire traffic, and
" holding it for months, possibly years, until the litigation is
" concluded. Such a provision is not only in conflict with sub-
" division 10, *supra*, but also with subdivision 3, *supra*, for the
" general law regulating the practice of courts of justice authorizes
" the writ of attachment only when the plaintiff, by affidavit,
" shows that the debt for the recovery of which the action is
" brought is not secured by any mortgage, lien, or pledge of real
" or personal property. [We make no point of the want of un-
" dertaking for the writ, for the reason that the State is not,
" under the general law on that subject, required to give an un-
" dertaking in any action brought by it.]

" Under the general law, the sale for taxes upon realty is of
" the realty, or some part thereof. Such a sale will also be for
" the taxes upon personal property, if assessed to the same per-
" son. Under such a sale there is a year at least in which to
" redeem. Under this special law, if the proceeding goes to
" judgment and sale, the sale may be entirely of personal prop-
" erty, from which there is no redemption ; if of realty, there is
" but six months in which to redeem.

" These are but a few of the points of difference between the
" general and special provisions of this law, but they are sufficient

" to show a marked and broad discrimination against the owners " of railroad property situate or operated in two or more counties " of the State. *It is a discrimination which is not made against* " *and does not apply to railroad property and the owners of rail-* " *road property generally, but only when the property is situate in* " *two or more counties. It is a matter of common knowledge that* " *there are numerous railroads in this State each situate wholly* " *within one county. To such this special mode of collection of* " *taxes has no application.*

" While it is true that a law which applies to all of a class in a " State is held to be a general law (to which rule, however, this " Court has held that there are some exceptions, as in *Ex parte* " Westerfield, 55 Cal., 550), it *is equally true that one which ap-* " *plies to only a part of a class is 'special,' and, under a constitu-* " *tional inhibition like ours, is void.* The case of *Dundee Mort-* " *gage Trust Co.* vs. *School District No. 1*, 10 Saw., 52, is directly " in point. The State of Oregon had a constitutional provision " providing that the Legislature should not pass 'special or local' " laws for the assessment and collection of taxes for State, county, " township or road purposes. An Act was passed providing for " the taxation of mortgages upon real property situate in no more " than one county, in which it was provided that mortgages upon " land situate in more than one county should be void. An " attempt was made to enforce the collection of taxes upon " mortgages upon land situate in no more than one county by " sale of the notes and mortgages, as provided might be done " under the Act. The sale was enjoined, and the Act declared " void, because it provided for the taxation of mortgages upon " lands situate in not more than one county, and not upon all " mortgages.

" Judge Deady, in discussing the question, said: 'An Act pro- " 'viding for the assessment of mortgages generally is, so far, a " 'general Act. It comprehends the genus. But an Act providing " 'for the assessment of all mortgages for sums exceeding five hun- " 'dred dollars, or not payable within one year from the date of " 'their execution, is special. It comprehends only a species of " 'mortgages. So an Act providing for the assessment of mort- " 'gages on woodlands, plowlands, or river-lands is special; and, " 'in my judgment, an Act that taxes mortgages on land in no " 'more than one county, to the exclusion of those on land in more " 'than one, is in the same category. It does not comprehend the " '*genus* mortgages, but only the *species*—one-county mortgages.' " So here, these provisions of law now under consideration do not " comprehend the *genus* railroads, but only the *species*—two- " county railroads.

" *The general law for the collection of taxes in this State provides* " *for the bringing of suit in certain cases, but this is not one of*

" *them, and is not brought in accordance with that general law.*
" *This is a fact which still further serves to mark the provisions*
" *under which this proceeding is had as special, and in violation*
" *of the prohibitions of the Constitution.*

" Section 3899 of the Political Code, a part of that general law,
" reads as follows :

" 'The Controller may, at any time after a delinquent list has
" been delivered to a collector, direct such collector not to proceed
" in the collection of any tax on said list amounting to three
" hundred dollars, further than to offer for sale but once
" any property upon which such tax is a lien. Upon such
" direction, the collector, after offering the property for sale
" once, and there being no purchaser in good faith, must
" make out and deliver to the Controller a certified copy
" ' of the entries upon the delinquent list relative to such tax ;
" ' and the tax collector, or the Controller, in case the tax collec-
" ' tor refuses or neglects for fifteen days after being directed to
" ' bring suit for collection by the Controller, may proceed by
" ' civil action in the proper court, and in the name of the people
" ' of the State of California, to collect such tax and costs.'

" This is the provision under which taxpayers other than those
" owning railroads situate or operated in two more counties may
" be sued for the collection of taxes. The proceedings and form
" of complaint are then similar to those in this case, and are open
" to the same objection, when tested by the codes, or by subdivi-
" sion 3, section 25, of article IV, of the Constitution, as already
" noted ; but the action cannot be brought or maintained until the
" property has been offered for sale by the tax collector, once at
" least, and even then it must be commenced in the county where
" the property is situate, and the money, when paid, whether be-
" fore or after judgment, must be paid to the county treasurer, and
" not to the State Treasurer. (Pol. Code, sec. 3900.)

" The appellant argues that all these special provisions now under
" consideration operate as and constitute an immunity in favor of
" the respondent, and that it cannot, therefore, complain of them.
" If appellant is correct in this, then these provisions are in direct
" conflict with section 21, article I, of the Constitution, and void.
" That section reads: 'No special privileges or immunity shall ever be
" ' granted which may not be altered, revoked or repealed by the
" ' Legislature ; nor shall any citizen, or class of citizens, be
" ' granted privileges or immunities which, upon the same terms,
" ' shall not be granted to all citizens.' But appellant is mis-
" taken as to the party to whom these special privileges and im-
" munities are granted. It is not to the few whose railroads are
" situate in two or more counties, but to those whose railroads
" are situate each entirely in one county, and to all other tax-
" payers, except those of the class to which this defendant be-
" longs.

"As to this defendant and the few others situate like it, "these provisions impose burdens not imposed upon other rail- "road corporations. *All railroad corporations in this State are "organized under one general law, and the constitutional provi- "sion with reference to that law is: 'Corporations may be formed "'under general laws, but shall not be created by special Act' "(art. XII, sec 1). This Court has held, in the most emphatic "terms, that any attempt to confer a benefit or impose a duty "upon one or more corporations formed under a general law, not "conferred or imposed upon all corporations formed under the "same law, is in conflict with this provision of the Constitution, "and void. 'Private corporations, formed for similar purposes, "'will stand upon the same footing, enjoy the same rights, and "'be subject to the same burdens, which cannot be increased or di- "'minished, except by general laws applicable to all.* * * * "'The rights and duties of all corporations formed under "'the general law * * * * are fixed and determined "'by its terms, and can only be changed or modified by "'amendment of the general law. And every such amendment "'must be made applicable to all corporations created under the "'general law.' (*San Francisco* vs. *S. V. W. W.*, 48 Cal., 493.) "The same doctrine has since been laid down and adhered to in "*Waterloo Turnpike Road Co.* vs. *Cole*, 51 Cal., 381; *Spring V.* "*W. W.* vs. *Bryant*, 52 Cal., 132; and *Omnibus Railroad Co.* "vs. *Baldwin*, 57 Cal., 160.

"That these provisions for the collection of taxes upon the "property of railroad companies operating in two or more coun- "ties do impose burdens not imposed upon other railroad com- "panies organized under the same general law seems to us too "plain for argument.

"From what we have already said, it follows that the judgment "appealed from in this case must be affirmed. It therefore be- "comes unnecessary to consider the only other point made upon "the demurrer. Our decision of that point either way would not "change the result.

"Judgment affirmed."

Federal Courts Adopt the Decisions of the Supreme Court of a State as to the Validity of Taxes Under the State Constitution.

"It is peculiarly the province of the highest court of a State to "decide whether the method pursued in the assessment and col- "lection of taxes is in conformity with the law of the State, and "its decision thereon is controlling."

Bailey vs. *Maguire*, 22 Wallace, 215–30.
State Railroad Tax Cases, 92 U. S., 575.

In *Nesmith* vs. *Sheldon*, 7 Howard, page 818, Chief Justice Taney said :

"It is the established doctrine of this court that it will adopt "and follow the decisions of the State courts in the construction of "their own Constitutions and statutes, when that Constitution "has been settled by the decision of its highest judicial tribunal."

See also *Carpenter* vs. *Page*, 17 Howard, 462.

State decisions construing the practice of the Acts of the State are binding upon the courts of the United States. *Atlantic & Pacific Railroad Company* vs. *Hopkins*, 94 U. S., 11 ; *Gomez* vs. *Dunn*, 14 Peters, 322 ; *Gage* vs. *Pumpelly*, 115 U. S., 454 ; *Lane County* vs. *Oregon*, 7 Wallace, 71 ; *Gilman* vs. *Sheboygan*, 2 Black 510 ; *Erie Railway Company* vs. *Pennsylvania*, 21 Wallace, 492 ; *Witherspoon* vs. *Duncan*, 4 Wallace, 210.

In Messrs. Shellabarger & Wilson's brief for plaintiffs it is conceded, at page 49, that this court will follow the Supreme Court of California on questions of a supposed conflict of the statutes of California with the Constitution thereof.

I do not care to discuss the other question in the case, believing, as I do, that the point already made is conclusive.

HARVEY S. BROWN,
Of Counsel for Defendant in Error.

Objections to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, and on the ground that the court has not jurisdiction, may be made at any time. These objections may be made for the first time in the Supreme Court.

Haskell vs. *Moore et al.*, 29 California Reports, 437.
Rogers vs. *Shannon*, 52 Cal., 99.

Section 434 of our Code of Civil Procedure provides that "if "no objection be taken, either by demurrer or answer, the defen- "dant must be deemed to have waived the same, *excepting only* "*the objection to the jurisdiction of the court and the objection that* "*the complaint does not state facts sufficient to constitute a cause of* "*action.*"

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF IN ERROR,

vs.

THE SAN PABLO AND TULARE RAILROAD COMPANY.

In Error to the Circuit Court of the United States for the Northern District of California.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

WM. H. H. HART, Attorney-General of California,
Attorney for Plaintiff in Error.

AYLETT R. COTTON, of Counsel.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

The Question Involved in This Case.

The only question presented by the record in this case is that arising under Section 1, Article XIV, of the Constitution of the United States; that is, whether in the making of the assessment, in compliance with the provisions of Sections 4 and 10, of Article XIII, of the Constitution of the State of California, of the taxes sought to be recovered in this action, the defendant is denied the equal protection of the laws; and the defendant's position in this respect is stated in its answer, page 7 of the record, in the following language:

"The provisions of Section 4 of the Constitution of the State of California, providing for the assessment of the property of railroad and other quasi-public corporations, is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas under said Section 4, of said Article XIII, of the Constitution of the State of California, if the property of natural persons or corporations not quasi-public, has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance; whereas, in the case of the property of railroad and other quasi-public corporations no such allowance or deduction is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of Article XIII of the Constitution of the State of California provides the same mode for the assessment of the franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations or by private corporations or by natural persons, yet Section 4, of Article XIII, of said Constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations."

The Court's findings are in the record, pages 21–24. The Court found that on the 2d day of September, 1878, the defendant was indebted in large sums of money, secured by mortgage on its railroad, franchises, rolling stock, and appurtenances, and that said indebtedness secured by said mortgage, exceeding $3,000 per mile on said road, has ever since continued to exist, and that the property was assessed by the State Board of Equalization at its full cash value, without deducting therefrom the value of the mortgage, or any part thereof, notwithstanding they had full knowledge of its existence; and that said Board, in making the assessment, did not deem nor treat the mortgage as an interest in the property.

As to all other objections to the assessment made by the answer, the findings are in favor of the plaintiff, leaving but the single question relating to the assessment of the defendant's property to the defendant, without deducting from its value the mortgage thereon.

By Sec. 4, Art. XIII of the Constitution of California, it is provided that "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof."

We understand that when this case was reached upon the calendar at a former term, this honorable Court having learned that the Supreme Court of the State of California had decided the case of *The People of the State of California* vs. *The Central Pacific Railroad Company*, 83 Cal. 395 (a suit to recover taxes), adversely to the State, suggested the passing of this case to the next term. Now that the opinion in that case has been published, we desire to call attention to the fact that this question, which is involved in the case at bar, was not passed upon in that case, that it was decided upon entirely different grounds, and that under the findings in this case none of the legal propositions arise upon which that case was determined.

That case was decided upon special demurrer to the complaint, which was sustained for defects in the complaint, as will appear from the following extract from the opinion, commencing at the bottom of page 398:

"Guided by that rule, when we examine this complaint we find it defective in all these particulars:

"1. The defendant is sued by a name indicating that it is not a natural person, but a company of some kind; but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being capable of being sued; nor, if incorporated, is there any averment to show where, or under what law, so that the Court may determine where jurisdiction of its person lies.

"An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. (*Loup* vs. *C. S. R. R. Co.*, 63 Cal. 99.)

"2. There is an averment of the fact of assessment of 'the franchise, roadway, roadbed, rails, and rolling stock of the defendant,' but there is no averment that the defendant is the owner of such or any property, situate in this State or elsewhere; nothing to show that the property so

assessed was or is within the jurisdiction of the Board making the assessment, or of this Court, nor, indeed, that there was any such property *in esse*.

"3. There is an averment that the Board apportioned the said assessment to seventeen different counties in the State, but there is nothing to show its authority to make any such apportionment; that any portion of the property, or of any property of the defendant, was situate in any one of said counties. The apportionment is of the total sum at which the assessment is made, without a word of description of the property so assessed, or of the part thereof so apportioned to any one of said counties.

"4. There is an averment of indebtedness for State taxes, but no averment that any taxes were ever levied or imposed upon the defendant or its property; or if a levy was made, when, where, or by whom it was made, or whether the taxes were based or levied upon the assessment so made, or the property so assessed as aforesaid, or that there are any State taxes against the defendant delinquent or unpaid.

"5. There is an averment of indebtedness for county taxes in each of the seventeen counties named, but as to each the same defect exists as above noted in reference to State taxes.

"6. If there is any cause of action stated in this complaint at all, there are eighteen separate and distinct causes of action, all in one count, and not separately stated. They affect, and if the money is collected it will belong to eighteen different persons, to wit: the State and seventeen separate counties. The only provision in the title of the Code on the subject of pleadings, which authorizes the uniting of several causes of action in the same complaint, requires that they shall all belong to one class, affect all the parties to the action, and must be separately stated. (Code Civ. Proc., Sec. 427.)

"7. The complaint is also ambiguous, for the reason stated in the sixth ground of demurrer."

It was not decided in that case that the assessment was invalid, neither has there been any decision in the Supreme Court of California determining that an assessment, such as is in question in the case at bar, is invalid.

It is specially mentioned in that case, page 406, that the assessment, or the apportionment thereof, was not attacked as being in conflict with the Constitution, referring to the State Constitution; nothing is said in the opinion concerning the validity of the assessment under the Constitution of the United States.

The following is from that opinion, page 406:

"It will be borne in mind that the Constitution provides for a difference in the mode of assessment only, not in the mode of levy or of collection of the tax on the property when assessed. Under the Constitution, it became necessary, or if not necessary at least proper, for the Legislature to pass laws providing the details for the assessment, and apportionment of the assessment, of this class of property by the State Board of Equalization. It is the only property in the State of which that Board is authorized by the Constitution to make assessment, and as the Board is only authorized to make such assessment when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became

necessary and proper that the Legislature should act, *and in so far as its action relates to the assessment, and the apportionment thereof, it is not attacked as being in conflict with the Constitution.*"

It appears from the findings that this case does not embrace questions relating to assessment of fences, bridges, steamboats, or Federal franchise, such as were involved in previous cases in this Court.

Resolution of the Legislature of California.

At the last session of the Legislature of California, a resolution was adopted setting forth the great importance to the State of having a decision of this honorable Court upon the question of the validity of that part of the Constitution of California relating to the assessment of the property of railroad corporations, and especially directing the Attorney-General of the State to endeavor to bring this case to a hearing and to obtain a determination of the constitutional question involved. The following is a copy of that resolution:

Assembly Concurrent Resolution No. 14.

Passed the Assembly, February 3, A. D. 1893. George W. Peckham, Clerk of the Assembly.

Passed the Senate, February 24, A. D. 1893. F. J. Brandon, Secretary of the Senate. By R. Shaw, Assistant Secretary.

This bill was received by the Governor this 1st day of March, A. D. 1893. M. R. Higgins, Private Secretary of the Governor.

CHAPTER XIV.—Assembly Concurrent Resolution No. 14, relative to petitioning and requesting the Supreme Court of the United States to hear and determine the action, now before said Court, in which the State of California is plaintiff in error and the San Pablo and Tulare Railroad Company is defendant in error, being cause No. 1467 upon the docket of said Court, which action involves the validity of the provisions of the Constitution of this State, relative to the taxation of railroads operated in more than one county. Adopted March 1, 1893.

WHEREAS, The validity of the provisions of the Constitution of the State, relative to the taxation of railroads operated in more than one county, has, since the year eighteen hundred and eighty, been questioned by railroad corporations affected by the assessments of property made by the State Board of Equalization, pursuant to said provisions of the Constitution; and whereas, the State of California has steadily sought to obtain a judicial determination of the legal questions involved and has prosecuted several actions to final decision in the Supreme Court of the United States, without securing a decision reaching to the merits of the case, because of the introduction into the records of the cases heretofore decided, of local questions which were deemed by the Court to be sufficient to defeat the actions, and therefore precluding the Court, under its established rules of procedure, from deciding the questions of constitutional law presented in the record; and whereas, the record in cause number one thousand four hundred and sixty-seven, entitled The People of the State of California, plaintiffs in error, vs. The San Pablo and Tulare Railroad Company, defendant in error, appealed from the Circuit Court of the United States for the Northern District

of California, presents to the consideration of the Court the single question of the alleged conflict of the Constitution of the State of California with the Fourteenth Amendment to the Constitution of the United States, in reference to the taxation of railroads operated in more than one county, and said record is wholly free from any question involving the constitutionality of any statute of this State providing for the collection of taxes levied upon railroads operated in more than one county, or other question which would preclude the Court from deciding the constitutional question therein presented; and whereas, the said action against the San Pablo and Tulare Railroad Company was taken up to the Supreme Court of the United States upon writ of error from said Circuit Court, as a test case agreed upon between the then Attorney-General of the State and the chief counsel of the Southern Pacific Company (which company operates and controls said San Pablo and Tulare Railroad) pursuant to a promise and agreement made by the chief counsel of the Southern Pacific Company to and with the Judiciary Committee of the Assembly of California, at its twenty-eighth regular session, in the year eighteen hundred and eighty-nine, which committee, at the time of such promise and agreement, was engaged, by the direction of the Assembly, in an investigation of the subject of unpaid taxes due from the Southern Pacific system of railroads; and whereas, counsel of said company, in violation of said promise and agreement, have heretofore resisted the efforts of the State of California to secure the hearing of said San Pablo and Tulare Railroad case in the Supreme Court of the United States; and whereas, the importance of this case to the people of this State is paramount to any consideration hinging upon the amount of taxes involved in the said action, and if left undecided the constitutional question therein presented will stand as a menace to the integrity of our taxation system, for as the decision of the Circuit Court of the United States controls until reversed by the Supreme Court, in any subsequent appeal that may be taken in an action presenting the same issue, the State of California must necessarily enter the Supreme Court of the United States as the plaintiff in error, thus putting it in the power of the defendant railroad to prevent consideration of the case by tendering payment of all sums involved in the action and moving the Court for its dismissal; and whereas, the finances of the State and several counties have been disturbed, embarrassed, and depleted by the resistance of the Southern Pacific Company to the enforcement of the laws of the State for the taxation of railroads, and believing that we, as the representatives of the people of the State, have a right to address our petition to the Supreme Court of the United States, a coördinate branch of the government of the nation, requesting and praying the Court to hear and determine an action to which the State is a party, more especially when such action concerns the right of the State to the exercise of its highest power, that of taxation, so necessary to its life, order, stability, and strength, and to ask in the name of the people of the State that the case now properly before the Court be heard and determined upon the record which both parties to the action have deliberately made for the determination of their respective rights; therefore, be it

Resolved by the Assembly, the Senate concurring, That the Attorney-General of the State be and he is hereby instructed to make, or cause to be made, application forthwith to the Supreme Court of the United

States to advance upon its calendar, and to hear and determine the said action of "The People of the State of California vs. San Pablo and Tulare Railroad Company, number one thousand four hundred and sixty-seven," and upon such application being made, to present this memorial to said Court.

Resolved, That this memorial be duly certified by the Governor of the State of California and furnished to the Attorney-General.

F. H. GOULD,
Speaker of the Assembly.
J. B. REDDICK,
President of the Senate.

Attest: E. G. WAITE,
Secretary of State.

STATE OF CALIFORNIA,
Department of State.

I, E. G. Waite, Secretary of State, of the State of California, do hereby certify, that I have carefully compared the annexed copy of Chapter 14, Assembly Concurrent Resolution No. 14, relative to petitioning and requesting the Supreme Court of the United States to hear and determine the action now before the Court, etc., with the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof Also, that this authentication is in due form, and by the proper officer.

Witness my hand, and the great seal of State, at office, Sacramento, California, the 3d day of March, A. D. 1893.

[SEAL]

E. G. WAITE,
Secretary of State.
By WM. H. STEVENS,
Deputy.

SACRAMENTO, March 3, 1893.

Hon. W. H. H. HART, *Attorney-General:*

DEAR SIR: In pursuance of resolution embodied in "Assembly Concurrent Resolution No. 14," I hereby transmit to you a copy of said Concurrent Resolution, duly certified by the Secretary of State, with the great seal attached.

Yours truly,

H. H. MARKHAM,
Governor.

Defendant's Offer.

In the year 1893, the defendant offered, and tendered to, the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which, this action was brought, and costs of suit, which offer and tender have not been accepted, but the money has been deposited by the defendant in bank, in accordance with the provisions of Section 1500 of the Civil Code of California, which reads as follows:

"An obligation for the payment of money is extinguished by due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor."

We deem it proper to mention this offer, inasmuch as defendant's counsel will no doubt bring it to the attention of this honorable Court, and urge the same as an objection to further entertaining this case.

We respectfully submit that this offer should not prevent the hearing of this cause and a decision of the constitutional question involved.

There are other cases depending upon the determination of this. It will be seen in the record, page 18, that there was a stipulation in this case, and three others, that the decision that might be made in this Court in the case of *The People of the State of California* vs. *The Central Pacific Railroad Co.*, should be treated as a decision in all of the cases, provided the decision should be upon points involved therein, and if not so made, then the judgment of the Circuit Court in any of these cases should be set aside and findings of fact therein made. That case having been decided against the State because the assessment included steamboats and Federal franchise (see 127 U. S. 1), and the question made in the present case under the Fourteenth Amendment not having been passed upon, counsel of the parties signed the stipulation which is contained in the record, pages 26–30, to have the judgment set aside in this case, and to submit the same to the Circuit Court upon the facts stated in the stipulation, and it was accordingly thus submitted and decided by the Circuit Court, the design of the stipulation thus submitting the case being to obtain a decision which would also dispose of the remaining two cases embraced in the stipulation first made, that stipulation having been made to carry out the design of the first, that is, to obtain a decision that will dispose of all these cases.

Therefore, nothing short of a payment of what is claimed in those two cases, as well as in this, should be regarded as dispensing with a decision of the constitutional question raised in this case, and which is the same in the three cases.

It is of the utmost importance to the people of the State of California, that it be determined whether an assessment of the property of railroad corporations in the manner required by the Constitution of California is valid, so it may be known, when these assessments are made, whether they can be included in the sources of revenue that can be relied upon in the administration of the government of that State, or whether such corporations are at liberty to decline to pay taxes, and to pay only what sums and when they may choose, merely as voluntary contributions to the public funds of California.

The Assessment is Valid.

The validity of the taxes in question is settled by decisions of this Court rendered since the adoption of the Fourteenth Article of Amendment.

In several cases it was contended that the mode of assessment was such as to deny to the party assessed the equal protection of the laws, but in every instance this Court has sustained the tax, and in the decisions has accorded to the States, under that amendment, large discretion in adjusting systems of taxation, classifying property for that purpose, and in discriminating between different classes of property.

The different mode prescribed by Section 4, Article XIII, of the Constitution of California, for assessing the property of railroad and other quasi-public corporations, from that of assessing other property, in respect to mortgages, is amply sustained by these decisions.

In the *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, this Court recognized the right of a State Legislature to classify property for taxation, and to assess these classes by different methods, and declared that the rule of equality "only requires the same means and methods to be applied impartially to all the constituents of each class."

In *Bell's Gap R. Co.* vs. *Pennsylvania*, 134 U. S. 232, it is said in the opinion, p. 237, that: "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution."

If to *entirely exempt* some classes of property from taxation is not, within the meaning of that amendment, to deny the equal protection of the laws to the owners of the remaining property which is made to bear all the burdens of taxation, the permitting of the owners of property other than railroad and other quasi-public corporations to treat mortgages on their property as an interest in the property for the purpose of taxation and assessing the same to the mortgagee, and assessing the value of the property, less such mortgage interest, to the owner of the property, is not denying the equal protection of the laws to such corporations which are not permitted to have mortgages on their property thus treated.

What is said in the opinion in *Home Ins. Co.* vs. *New York State*, 134 U. S. 606, concerning legislation applicable to artificial bodies, is directly in point in this case, it being there declared: "Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the subjects sought to be obtained by it. *And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions*, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies, and associations *of the same kind* are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

The people of California, in framing the Constitution of that State, deemed it expedient to constitute railroad and other quasi-public corporations a class, and to make provision for the assessment of the property of any such corporation when mortgaged, in a different mode from that of assessing other mortgaged property, and the authority to do this is sustained by that opinion.

It is also said in that opinion, page 606: "But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

In the recent case of *Pacific Express Co.* vs. *Seibert, State Auditor*, 142 U. S. 339, this Court has expressly affirmed the decisions in those two cases in 134 U. S., and say in the opinion that: "This Court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms."

By these authorities it is established that just such classifications and regulations in respect to taxation as are prescribed by the Constitution of California, and are under consideration in this case, are permissible under the Fourteenth Amendment, and that this Court has not assumed to control legislation in the States on these subjects, nor to investigate the particular reason that induced any plan of taxation that may have been adopted. The only possible restriction that has been suggested in any of these decisions upon the action of the States is that stated in *Bell's Gap R. Co.* vs. *Pennsylvania*, 134 U. S. 237, where it is said: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Government, might be obnoxious to the constitutional prohibition."

Nothing of this character appears in this case.

If that uniformity and equality of taxation for which defendant's counsel contend were required by that amendment, it would bring in conflict therewith many of the provisions in regard to taxation which have been adopted in the different States.

Deducting the value of a mortgage from the value of the property incumbered thereby, as an interest therein, and which defendant's counsel claim should have been also authorized as to the property of railroad corporations, does not result in equality of taxation. One man owns property subject to taxation and owes $1,000 on his promissory note, but has not mortgaged his property therefor; his neighbor owes the same amount and has secured his note for the same on his property. In the latter instance the $1,000 mortgage debt is treated as an interest in the mortgaged property and assessed to the mortgagee, and only the excess of the value of the mortgaged property assessed to the mortgagor; while in the former, the entire value of the debtor's property is assessed to himself. Here is inequality in assessment to the extent of $1,000, so far as the two debtors are concerned. It is true that the property of the one is assessed no higher than that of the other, but in case of the mortgage, the mortgage interest in the property is assessed to the mortgagee. Neither is the property of a railroad corporation assessed, under the Constitution and laws of California, any higher than other property; but where there is a mortgage on other property, it is treated as an interest in the property, and that interest is assessed to the mortgagee.

Another illustration of inequality in assessments appears in connection with Section 1, Article XIII of the Constitution of California, which

declares that "The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a reduction, from credits, of debts due to bona fide residents of this State."

By Section 3629 of the Political Code of California a reduction of this character is authorized.

Under this provision, if a man's property consists of money that he loans, and he contracts debts to residents of California, he can have a reduction of the assessment on his property to the extent of the debts; while another person, who is not a money loaner, and has his means invested in other property, can have no reduction from his assessment, however much he may owe, unless he has secured his indebtedness by a mortgage, in which case the mortgage interest is assessed to the mortgagee.

Similar provisions for deducting debts from credits, or from moneys and credits, exist in other States.

In California there is no exemption from taxation of churches or church property. In many of the States all such property is exempted, amounting in a single State to a large sum in value; and in States where such exemption is made, the other property must necessarily bear the taxes which, were the laws the same as in California, would be paid upon church property.

If the Fourteenth Amendment was designed, as urged by defendant's counsel, to require uniformity and equality of taxation, how can it be that the equal protection of the laws is alike maintained in a State where church property is exempted from taxation, and other property must consequently pay an increased rate, and in a State where church property pays its proportion of taxes?

We respectfully submit that the position that the provisions of the Constitution of California, under consideration, are in conflict with the Fourteenth Amendment is untenable; and we respectfully ask that this Court direct judgment for the plaintiff, upon the findings of fact made by the Circuit Court, and without further trial.

WM. H. H. HART,
Attorney-General of California,
Attorney for Plaintiff in Error.

AYLETT R. COTTON,
Of Counsel for Plaintiff in Error.